Supreme Court Copy

S174507

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTUARDO ARDON, ~~on behalf of himself and all others similarly situated,~~
Plaintiff and Appellant,

vs.

CITY OF LOS ANGELES
Defendant and Respondent.

After A Decision By The Court Of Appeal
Second Appellate District, Division Three
Case No. B201035

Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC363959

OPENING BRIEF ON THE MERITS

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To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Appellant Estuardo Ardon respectfully appeals from an Opinion by the Court of Appeal, Second Appellate District, Division Three (Kitching, J., with Klein, P.J., concurring and Croskey, J., dissenting). The Court of Appeal's opinion, previously published at *Ardon v. City of Los Angeles* (2009) 174 Cal.App.4th 369 [94 Cal.Rptr.3d 245] (*Ardon*), affirmed in pertinent part the order of the trial court granting the City of Los Angeles' (the "City") motion to strike the class allegations in Appellant's Corrected First Amended Class Action Complaint (the "Complaint"). The Complaint alleges that the City has improperly required telephone companies to collect and remit taxes from telephone users on long distance and bundled telephone services which were not subject to taxation under the express terms of the City code.

ISSUES PRESENTED BY APPELLANT

(1) Does Government Code section 910, as construed by this Court's decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 [115 Cal.Rptr. 797] (*City of San Jose*), permit the filing of a class claim with a local public entity for the refund of local taxes? (Yes.)

(2) Does article XIII, section 32 of the California Constitution apply to actions against local entities for the refund of local taxes? (No.)

ISSUES PRESENTED BY RESPONDENT

(1) Should this Court's decision in *City of San Jose* be extended to allow the filing of class claims against local public entities for tax refunds?

(2) Does this Court's decision in *Woosley v. State of California* (1992) 3 Cal.4th 758 [13 Cal.Rptr.2d 30, 838 P.2d 758]

(*Woosley*), require that tax refund claims against local entities strictly comply with applicable claiming requirements?

(3) Does article XIII, section 32 of the California Constitution require that tax refund claims against local entities strictly comply with applicable claiming requirements?

(4) Does public policy require that tax refund claims against local entities strictly comply with applicable claiming requirements?

INTRODUCTION

The Court of Appeal's decision in this case should be reversed, not only because it wrongly interprets and applies article XIII, section 32 of the California Constitution, this Court's long settled precedents, and the Government Claims Act (Gov. Code, § 900 et seq.) ("GCA"), but also because the practical impact of its decision is to strip payors of local taxes of any meaningful remedy or effective means of redressing claims against an overreaching local governmental entity. Local governments such as the City should not be permitted to thwart class claims and thereby retain illegally collected taxes based on the meritless assertion that they "planned" upon the continued flow of such illegally collected funds.

The GCA expressly provides for the filing of claims on behalf of others. The word "claimant" in section 910 was held by this Court to include a class and that holding has never been reversed by the Legislature. By providing for class refund claims, the GCA provides effective, meaningful and practical protection to taxpayers who would otherwise not be able to pursue meritorious tax refund claims.

The telephone utility taxes ("TUT") at issue here are a prime

example.[1] The TUT (for which the Legislature has enacted section 910) is relatively small and almost invisible to the ordinary taxpayer, unlike property taxes, for example, which are relatively large and highly visible to property owners (and for which the Legislature has created a separate, specific refund statute (Rev. & Tax. Code, § 5097)). Typical local TUTs range from five to ten percent of telephone charges which, for an average monthly phone bill of around $50, results in a monthly tax of around $2.50 to $5.00. Furthermore, there is no requirement that telephone service providers separately state the amount of the TUT collected. The providers that do separately list the TUT typically include it in a laundry list of other taxes and fees, including numerous federal and state surcharges and taxes.

In 2006, Plaintiff Ardon discovered that the TUT had been improperly collected on telephone charges for long distance and bundled service after several federal courts held that a federal telephone tax (the "FET") (26 U.S.C. § 4251), which had been incorporated into the City's TUT ordinance, was not applicable to those services. The federal government had notified taxpayers of the improper tax levied and voluntarily paid refunds of the FET, but the City neither provided such notice nor paid refunds – even though the City had expressly incorporated the terms of the FET into its own TUT ordinance. As a result, Plaintiff Ardon filed an administrative refund claim with the City as required by

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[1] Some corporate taxpayers are due large enough refunds to make individual litigation over the TUT practical and, indeed, some are pursuing individual refund claims against the City now. (See *Nextel Boost of California, LLC, dba Boost Mobile v. City of Los Angeles* (Super. Ct. Los Angeles County, Case No. BC406437); *J2 Global Communications, Inc. v. City of Los Angeles* (Super. Ct. Los Angeles County, Case No. BC404694); and *Tracfone Wireless, Inc. v. City of Los Angeles* (Super. Ct. Los Angeles County, Case No. BC363735).) The vast majority of taxpayers are due small refunds, however, and should not be deprived of justice because their individual resources and claims are small.

section 910. Pursuant to *City of San Jose*, *supra*, 12 Cal.3d 447, which held that class claims against government entities are authorized by section 910 (*id.* at p. 457), he filed his refund claim on behalf of himself and all other taxpayers similarly situated. The City rejected Ardon's claim.

As this Court has stated, the purpose of such an administrative claim is to allow the City an opportunity to investigate and settle the claim without the expense of litigation. (*City of San Jose*, *supra*, 12 Cal.3d at p. 455.) The claims statutes are not intended to "thwart class relief." (*Id.* at p. 457.) Upon receipt of Ardon's claim, the City was placed on notice of his claims and the TUT ordinance alleged to have been violated. Further, the City knew from its own records the amount of money it had collected pursuant to that TUT ordinance and the potential amount it owed in refunds.[2] As a consequence, the purpose of the GCA was fulfilled: the City had an opportunity to investigate and settle the claim. The City's decision to deny the claim and litigate stands in stark contrast to the Internal Revenue Service's (the "IRS") voluntary return of the moneys it illegally collected pursuant to the FET.

The GCA is a general claims statute enacted by the California Legislature in 1959 to provide a uniform statewide procedure for the presentation of claims for money or damages against local and state government entities and to eliminate the confusing patchwork of local and state procedures that had existed prior to 1959, which was "unduly complex, inconsistent, ambiguous and difficult to find, ... productive of

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[2] In addition, the City has access to the records of telephone service providers. Section 21.1.11 of the Los Angeles Municipal Code (hereafter "City Code") requires providers "to keep and preserve, for a period of three years, all records as may be necessary to determine the amount of such tax as he may have been liable for the collection of and remittance to the Director of Finance. ..." and further provides that "the [City] Clerk shall have the right to inspect at all reasonable times" the records maintained. (Appendix ("App.") A.)

much litigation and ... often result[ed] in the barring of just claims." (Recommendation and Study Relating to the Presentation of Claims Against Public Entities (Jan. 1959) 2 Cal. Law Revision Commission Rep. (1959) at p. A-7 (App. B) (hereafter "Commission Rep.").)[3] The Legislature went to great lengths to ensure that the procedures it enacted in the GCA would create a statewide, uniform system including, among other things, amending the State Constitution to ensure that the procedures would apply to charter cities and counties, and amending the Code of Civil Procedure to make clear that statutes of limitations would be governed by the GCA. Further to that end, section 905, subdivision (a) expressly distinguishes tax claims under the Revenue and Taxation Code or other "statute," as that term is defined, from tax claims subject to the general claim presentation requirements of section 910. Tax refund claims not exempted from section 910 are expressly made subject to section 910. (Gov. Code, §§ 811.8, 905(a).)

Under section 910, claims against government entities are to be presented by "**the claimant or by a person acting on his or her behalf**...." (Gov. Code, § 910, emphasis added.) In *City of San Jose*, this Court held that the word "claimant" in section 910 "must be equated with the class itself" and therefore permits the filing of class claims. (*City of San Jose*, *supra*, 12 Cal.3d at p. 457.) This Court never overruled or even narrowed its 1974 holding in *City of San Jose*, nor has the Legislature taken any steps to do so, even though it has amended the very clause of section 910 containing the word "claimant" in other respects.

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[3] Appellant has appended only the relevant pages of the California Law Revision Commission Recommendation and Study at Appendix B. The full report is found at <http://clrc.ca.gov/pub/Printed-Reports/Pub019.pdf>.

Following *City of San Jose*, in January 2008, the Second Appellate District, Division Three ***unanimously*** held, in a case indistinguishable from this one in all material respects, that class refund claims to recover local taxes from a local entity were proper under section 910. (*County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 357 [71 Cal.Rptr.3d 485, 487] (*Oronoz*).) On April 30, 2008, this Court rejected a Petition for Review in *Oronoz*. (*County of Los Angeles v. Superior Court (Oronoz)*, No. S161501.)

Sixteen months after the issuance of the unanimous *Oronoz* opinion, however, a different panel of Division Three of the Second Appellate District refused to apply *City of San Jose* here, overruling its own decision in *Oronoz*. There was no change in the applicable law between the *Oronoz* and *Ardon* decisions. Justice Croskey, who authored the *Oronoz* opinion, issued a strong dissent in *Ardon*. Presiding Justice Klein, who had been part of the unanimous *Oronoz* panel, issued a short concurring opinion in *Ardon*, but requested that this Court review the opinion to "resolve the conflict between the *Oronoz* decision and the majority opinion" and because of the importance of the issues presented herein upon the public fisc. (*Ardon*, *supra*, 174 Cal.App.4th at p. 386 (conc. opn. of Klein, P.J.).) Indeed, the state of the public fisc is the only circumstance to have changed since the *Oronoz* decision.

Ardon is the second of two opinions issued in one month by Division Three of the Second Appellate District that takes an overly-broad view of article XIII, section 32's application. In *Loeffler v. Target Corp.* (2009) 93 Cal.Rptr.3d 515, review granted, ____ Cal.Rptr.3d ____, 2009 WL 3109817 (Sept. 9, 2009) (No. S173972) (*Loeffler*), the plaintiff filed a class action against a private company, Target Corporation, for refund of excess sales tax imposed on purchases of hot coffee "to go" because sales tax was allegedly not due on such purchases. The court's opinion, again authored

by Justice Kitching, relies in part upon *Woosley* which Justice Kitching felt had "broadly construed article XIII, section 32 in light of the overriding policies behind that provision." (*Loeffler*, *supra*, 93 Cal.Rptr.3d at p. 531.)

In *Ardon*, the Court of Appeal improperly extended the stated reach of article XIII, section 32 beyond state entities and their agents to a local government. *Ardon* also mutated the "pay first, litigate later" policy behind article XIII, section 32 of the Constitution into a blanket ban on class tax refund claims in contravention of the clear legislative scheme expressed in section 910 allowing such claims. *Ardon* effectively denied taxpayers any meaningful remedy or effective means of redress for the illegal collection of taxes by an overreaching government. Accordingly, it is respectfully submitted, *Ardon* should be reversed.

FACTUAL BACKGROUND AND PROCEEDINGS

For many years, the City has required telephone companies to collect and remit taxes from telephone users on long distance and bundled telephone services even where calls are ***not*** charged by ***both*** elapsed time and distance.[4] (Clerk's Transcript ("CT") 12; App. A.) However, these services were not taxable under the plain language of the City Code section 21.1.3(a) (the "TUT").[5]

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[4] Although the telephone companies calculate and collect the tax, the Legislature has expressly absolved them from any responsibility to investigate or inquire about the validity of the tax they collect. (Pub. Util. Code, § 799.)

[5] On February 16, 2007, the City purportedly amended the TUT to eliminate the reference to the FET and to tax telephone service regardless of whether it is charged by both elapsed time and distance. (CT 19, 49-53.) However, Plaintiff alleges that the purported amendment was illegal, as discussed *infra*. All references to the TUT, unless otherwise specified, are to the ordinance as it existed prior to the amendment, a copy of which is attached hereto as App. A.

The TUT imposed a 10% tax on amounts paid for all telephone services used by every person in the City. (CT 12; App. A) Expressly excluded from the TUT were amounts paid for telephone services "to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under section 4251 of Title 26 of the United States Code, as such section existed on November 1, 1967." (City Code §21.1.3(d) (CT 13; App. A).) Therefore, telephone services not subject to the tax imposed by the FET, were also not subject to the TUT.

The FET only applies to long distance service where calls are charged by ***both*** time ***and*** distance. Since most modern long distance telephone service is charged via a postalized[6] fee structure (i.e. where charges vary solely by elapsed time and not by distance), typical long distance telephone service is not subject to the FET.[7] Nevertheless, despite the unambiguous language of the FET and TUT, for many years both the federal government and the City required service providers to collect taxes on all long distance service regardless of whether calls were being charged by ***both*** time ***and*** distance.

Beginning around 2004, however, some corporate taxpayers began challenging the applicability of the FET to long distance and bundled services. In those cases, five United States Circuit Courts of Appeal, the Court of Federal Claims, and five United States District Courts ***unanimously*** held that in order to be taxable under the plain language of the FET, charges for long distance telephone services ***must*** be based on

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[6] The term "postalized" derives from the fact that the charge to mail a letter does not vary by distance.

[7] Plaintiff here does not challenge the applicability of the FET or TUT to local telephone service for which a separate charge applies (i.e., non-bundled, local service).

both distance ***and*** elapsed transmission time.[8] In light of these clear pronouncements by the federal courts, the IRS ceased collecting the FET on long distance and bundled telephone service in July 2006 and voluntarily provided refunds of the improperly collected tax for a period of roughly three years. (See IRS Notice 2006-50 (CT 27-40).)

Contrary to these clear pronouncements by the federal courts and the actions of the IRS, however, the City continued to collect the TUT on services to which neither the FET nor, consequently, the TUT applied. (CT 10, 12-16.) In fact, the City never offered or even informed taxpayers of their right to refunds of these illegally collected taxes. (CT 10 at ¶12.)

On October 19, 2006, pursuant to section 910 and *City of San Jose*, Ardon served a refund claim on the City Council, City Controller, Director of Finance, and Treasurer seeking return on behalf of himself and all similarly situated taxpayers of the money that had been improperly collected and retained by the City. (CT 10 at ¶14; 42-45.) The City rejected Plaintiff's claim and instead attempted to illegally amend the taxing ordinance, without voter approval, to include the charges that Plaintiff identified as not being taxable.[9] (CT 11 at ¶¶15-16; 19 at ¶¶68-71;

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[8] See *Reese Bros., Inc. v. U.S.* (W.D. Pa., Nov. 30, 2004, No. 03-CV-745) 2004 WL 2901579, affd. (3d Cir. 2006) 447 F.3d 229; *Hewlett-Packard Co. v. U.S.* (N.D. Cal. Aug. 5, 2005, No. C-04-03832 RMW) 2005 WL 1865419; *Fortis, Inc. v. U.S.* (S.D.N.Y. 2004) 420 F.Supp.2d 166, affd. (2d Cir. 2006) 447 F.3d 190; *Am. Online, Inc. v. U.S.* (Fed.Cl. 2005) 64 Fed.Cl. 571; *Honeywell Int'l, Inc. v. U.S.* (Fed.Cl. 2005) 64 Fed. Cl. 188; *Nat'l R.R. Passenger Corp. v. U.S.* (D.D.C. 2004) 338 F.Supp.2d 22, affd. (D.C. Cir. 2005) 431 F.3d 374; *OfficeMax, Inc. v. U.S.* (N.D. Ohio 2004) 309 F.Supp.2d 984, affd. (6th Cir. 2005) 428 F.3d 583, rehg. en banc den. (Mar. 30, 2006) 428 F.3d 583; *Am. Bankers Ins. Group, Inc. v. U.S.* (S.D. Fla. 2004) 308 F.Supp.2d 1360, revd. (11th Cir. 2005) 408 F.3d 1328.

[9] By seeking to amend the tax without voter approval, the City violated article XIIIC of the California Constitution (or Proposition 218). (Cal. Const. art. XIIIC, § 2(b); CT 11, 19, 21-22.) Eventually, on February

49-52.)

Appellant then filed the instant action for declaratory and injunctive relief, money had and received, violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and writ of mandamus. The City demurred to Appellant's complaint and brought a Motion to Strike, requesting an order striking the portions of Appellant's Complaint seeking to prosecute the action as a class action. On July 6, 2007, the Honorable Anthony J. Mohr partially sustained the demurrer without leave to amend and struck Appellant's class allegations. On May 28, 2009, the Court of Appeal, Second Appellate District, Division Three affirmed in pertinent part the order of the trial court striking Appellant's class allegations.

The Court of Appeal's split decision in *Ardon* overruled a unanimous decision of the same Division (including two of the same panel members) just sixteen months earlier in *Oronoz*, which held that under *City of San Jose*, a section 910 claim for a refund of local taxes ***could*** be asserted against a local government on behalf of a class. (*Oronoz*, *supra*, 159 Cal.App.4th at p. 357.) Justice Croskey, who authored the unanimous opinion in *Oronoz*, issued a strong dissent, adhering to his position in that case that "a class claim for tax refunds against a local public entity [is] permissible under Government Code section 910 in the absence of a specific tax refund statute prescribing procedures to claim a refund of the taxes at issue." (*Ardon, supra*, 174 Cal.App.4th at p. 387 (dis. opn. of Croskey, J.).)

5, 2008, the City submitted a TUT amendment to a vote of the citizens of the City and received voter approval. Thus, beginning on the effective date of the voter-approved amendment, the collection of the TUT was no longer illegal as to long distance and bundled telephone service.

LEGAL DISCUSSION

I. THE STANDARD OF REVIEW IS *DE NOVO*

On appeal from an order of dismissal after a demurrer is sustained without leave to amend, the Court must review the pleading *de novo* to determine whether it alleges a cause of action under any legal theory. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879 [6 Cal.Rptr.2d 151].) The Court must "assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146].) Also, the Court must accept as true all facts that may be implied or inferred from the facts that have been expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 [44 Cal.Rptr.2d 339].) "Courts must also consider judicially noticed matters." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal.Rptr.3d 457, 460, 79 P.3d 569, 572].)

II. GOVERNMENT CODE SECTION 910 PROVIDES FOR THE FILING OF A CLASS CLAIM FOR REFUND OF THE TUT

A. The Applicable Claim Statute Is Government Code Section 910

The applicable refund claim statute here is indisputably section 910.[10]

In drafting the GCA, the Legislature intentionally provided for taxes like the TUT to be covered by section 910 to promote uniformity and fairness. Prior to 1959, most claims against California government entities were subject to a patchwork of statutes, county and city charters, and local

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[10] The Court of Appeal held that "the applicable claims statute is Government Code section 910...." (*Ardon, supra*, 174 Cal.App.4th at p. 373.) The City did not seek review of that holding.

ordinances. In 1959, the California Law Revision Commission determined that "the law of this State governing the presentation of claims against governmental entities is unduly complex, inconsistent, ambiguous and difficult to find, that it is productive of much litigation and that it ***often results in the barring of just claims***." (Commission Rep., *supra*, 2 Cal. Law Revision Com. Rep. at p. A-7 (App. B), emphasis added.) Accordingly, upon the Law Revision Commission's recommendation in 1959, the California Legislature enacted a single, uniform claims presentation procedure set forth at Government Code former section 700 et seq. (Stats. 1959, ch. 1724, p. 4133 et. seq. (App. C)), now Gov. Code, section 900 et seq., which replaced the over 174 separate procedures that had previously governed claims against government entities. (See *Baines Pickwick Ltd. v, City of Los Angeles* (1999) 72 Cal.App.4th 298, 306 [85 Cal.Rptr.2d 74].)

The Law Revision Commission originally proposed that the uniform procedures prescribed in the GCA would not apply to "[c]laims under the Revenue and Taxation Code or other ***provisions of law*** prescribing procedures for the refund ... of any tax ...." (Commission Rep., *supra*, 2 Cal. Law Revision Com. Rep. at p. A-12 (App. B) (Proposed Section 703(a)), emphasis added.) Therefore, under the Law Revision Commission's proposal, local government entities would have continued to prescribe their own tax refund procedures by charter or ordinance.

However, the Legislature did not agree with that exemption. Instead, section 905(a)[11] as enacted by the Legislature in 1959 exempted from the Act's coverage only those "[c]laims under the Revenue and Taxation Code or other ***statute*** prescribing procedures for the refund [of taxes] ...." (Stats.

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[11] For ease of reference we use the current section designations. Section 905(a) and (b) were enacted as 703(a) and (b) in 1959.

1959, ch. 1724, p. 4133, (App. C), emphasis added.) The difference was not merely stylistic.

The GCA has clearly and consistently distinguished ***statutes*** from city and county charters and ordinances.[12] A comparison of section 905(a) and its immediate neighbor 905(b) is telling. Although both the proposed versions of 905(a) and (b) drafted by the Law Revision Commission used the words "other provisions of law" to describe claims which would be excepted from the GCA, the Legislature enacted subsection 905(b) *exactly* as proposed by the Law Revision Commission, but in subsection 905(a) the Legislature changed the words "other provisions of law" to "other ***statute***." (Stats. 1959, Ch. 1724, at pp. 4133-34, (App. C), emphasis added.) The fact that the Legislature changed the language in 905(a) but did not change identical proposed language in the immediately following subsection (b) demonstrates that the two subsections were intended to have different meanings. If there were any lingering doubt, the 1963 amendments to the GCA added section 811.8, specifically providing, "'Statute' means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act." (Stats. 1963, ch. 1681, p. 3267, (App. D).)

From time to time, the Legislature prescribes tax-specific refund statutes tailored to the taxes to which they solely apply. (See e.g., Veh. Code, § 42231 et seq. [providing refund procedures for fees or fines erroneously assessed by the Department of Motor Vehicles].) The same is true for locally collected taxes – in certain instances the Legislature enacts a tax-specific refund statute, even where the tax is assessed and collected

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[12] For example, former section 730 (now section 935), provided that claims excepted by section 703 (now section 905) which were not governed by "other statutes or regulations" would be subject to the "procedure prescribed in any ***charter, ordinance or regulation adopted by the local public entity***." (Stats. 1959, ch. 1724, p. 4138, (App. C), emphasis added.)

locally. (See e.g., Rev. & Tax. Code, §§ 5097, 5140 [specifying refund claim procedures for property taxes]; see also Bus. & Prof. Code § 5499.14 [specifying refund claim procedures for city and county refunds of assessments for illegal advertising displays].) In some instances, the Legislature has also delegated authority to prescribe tax-specific refund claim procedures. (See, e.g., Ed. Code, § 17033 [delegating to the State Allocation Board authority to prescribe refund procedures for rent and fees charged in connection with the rental of school buildings].)

However, where, as here, the Legislature has neither created a tax-specific refund statute, nor delegated authority to create a tax-specific refund procedure, the GCA supplies the procedure for presenting a claim. (See e.g., Opinion of the Attorney General of the State of California, 1971 Cal. AG LEXIS 48, 2-3, 54 Ops.Cal.Atty.Gen. 177 (1971) [opining that where no tax refund procedure is specified by statute, the Government Code supplies the manner for bringing tax refund claims against a local entity].)

B. *City Of San Jose* Held The Filing Of A Class Claim Under Government Code Section 910 To Be Proper

In *City of San Jose*, this Court held that the procedure specified by section 910, which permits claims to be filed by a "claimant ***or by a person acting on his or her behalf***," allows claims to be filed on behalf of a class. (*San Jose, supra*, 12 Cal.3d at p. 455, emphasis added.) That holding is supported not only by the clear language of section 910 but also by other sections of the GCA which provide that the claim form may be "signed by the claimant *or by some person on his behalf*" (Gov. § 910.2, emphasis added), and further provide a mechanism for notices to be sent to an address designated by the class representative. (Gov. Code, §§ 910(b), 915.4.)

The Legislature has acquiesced in that holding for 35 years, even while it amended the very clause that *City of San Jose* interpreted in other respects.[13] (See Stats. 1987, ch. 1201, § 17; Stats. 1987, ch. 1208, § 2; Stats. 1998, ch. 931 (S.B.2139), § 174, eff. Sept. 28, 1998.) Allowing class claims for refund of the myriad small or inconspicuous taxes applied to everyday services and products strikes a balance which ensures fundamental fairness to taxpayers and provides a check on potential abuse of government power.

C. *Ardon* Improperly Rejected This Court's Definition of "Claimant"

The only Court of Appeal opinions that have decided whether section 910 permits the filing of a class claim for the refund of taxes are the opinion below and *Oronoz*. The *Ardon* Court's ruling, that taxpayers have no right to file class tax refund claims under section 910, improperly conflicts with this Court's longstanding decision in *City of San Jose*. Specifically, this Court held that "claimant" in section 910 means the class itself, that an individual claim need not be filed for each member of the purported class, and that the claim must provide the name, address, and other specified information concerning the ***representative*** plaintiff and sufficient information to identify and make ascertainable the class. (*City of San Jose, supra*, 12 Cal.3d at p. 457.) In so holding, this Court explicitly rejected the idea expressed in *Ardon* that the "syntax and diction" of section 910 require individualized information as to each claimant. (*Ardon, supra,* 174 Cal.App.4th at p. 382.)

Most importantly, contrary to the *Ardon* opinion, nothing in section 910 or *City of San Jose* suggests that the meaning of "claimant" should

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[13] In 1987, the Legislature added "or her" to that portion of section 910 that reads, "A claim shall be presented by the claimant or by a person acting on his ***or her*** behalf...." (Gov. Code, § 910, emphasis added; Stats. 1987, ch. 1201, § 17; Stats.1987, ch. 1208, § 2.)

vary with the identity of the claimant or the nature of the underlying claim. In fact, as detailed above, the Legislature expressly provided that tax refund claims not governed by another specific tax refund statute were to be governed by section 910. (Gov. Code, § 905(a).)

Ardon's stated justification for redefining "claimant" in section 910 is completely at odds with this Court's analysis of section 910 in *City of San Jose*. The *Ardon* majority claimed that it was "strictly" rather than "substantially" construing the statute,[14] purportedly relying on *Woosley* and article XIII, section 32 of the California Constitution. (*Ardon, supra,* 174 Cal.App.4th at p. 381.) However, as discussed below, neither *Woosley* nor article XIII, section 32, nor the policy underlying article XIII, section 32 require a different definition of the word "claimant" within section 910 than the one given by this Court in *City of San Jose*.

The *Ardon* court framed the issue as follows:

> [W]hether a claimant can file a section 910 claim on behalf of a class depends on whether the claimant is required to comply strictly with the requirements of the statute or whether the claimant can merely substantially comply. ***If strict compliance is required, the claimant cannot pursue a class claim. On the other hand, if the claimant's substantial compliance can satisfy the statute, he or she can pursue such a claim.***

(*Ardon, supra*, 174 Cal.App.4th at p. 378, emphasis added.)

The Court of Appeal incorrectly concluded that "where, as here, the claimant seeks a refund of taxes, ***strict compliance*** is required." (*Ardon, supra*, 174 Cal.App.4th at p. 378, emphasis added.) To the contrary, the Legislature expressly provided that a ***substantial compliance*** standard applies to tax refund claims presented pursuant to section 910.

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[14] It is not clear what it means to "substantially" construe a statute. The majority here seems to have conflated the concepts of strict construction and strict compliance.

Specifically, section 910.8 provides that if the board to whom a claim is submitted under the Act determines that "a claim as presented fails to ***comply substantially*** with the requirements of section 910," it may give written notice stating with particularity the defects or omissions in the claim. (Gov. Code, § 910.8, emphasis added.) Further, "a failure or refusal to amend a claim ... shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented ***complied substantially*** with Section 910 ...." (Gov. Code, § 910.6, emphasis added.) Indeed, even a failure to substantially comply with the form requirements is waived if notice is not provided within a specified time pursuant to section 911 of the GCA. (See Gov. Code, §§ 910.8, 911.) The City gave no such notice here. Nowhere in *Woosley* does this Court say that plaintiffs in tax refund actions must as a general rule "strictly comply" with the applicable claims statutes.[15]

D. *Woosley* Neither Construed Nor Applied Government Code Section 910

Woosley neither construed nor applied section 910. Furthermore, *Woosley* did not disapprove *City of San Jose* nor suggest that its holding with respect to claims under section 910 should be limited to inverse condemnation and nuisance claims, as the *Ardon* court stated. (*Ardon,*

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[15] This Court has never held that tax refund claims which are permitted as a matter of substantive statutory law should be held to a standard of strict compliance with form requirements. Such a requirement would result in the denial of many just claims based on minor technical errors. (See *Mission Hous. Dev. Co. v. City & County of San Francisco* (1997) 59 Cal.App.4th 55, 70 [69 Cal.Rptr.2d 185] [explaining that while its decision in *Neecke v. City of Mill Valley* (1996) 39 Cal.App.4th 946, 960-965 [46 Cal.Rptr.2d 266] (*Neecke*) "spoke in terms of requiring strict compliance with the administrative procedures established by the Legislature for tax refund claims[,] ... [t]he pertinent issue in both *Neecke* and *Woosley* ... was one of standing, i.e., whether the plaintiffs in those cases could maintain class actions under the applicable tax code provisions."].)

supra, 174 Cal.App.4th at pp. 383-384.) *Woosley* simply refused to extend the holding in *City of San Jose* to tax refund claims governed by ***other statutes***.

This Court's statement in *Woosley* that "the holding of *City of San Jose* ... should not be extended to include claims for tax refunds," did not overrule *City of San Jose*'s interpretation of section 910. (*Ardon, supra*, 174 Cal.App.4th at p. 388 (dis. opn. of Croskey, J.).) Instead, the "extension" to which this Court objected was that "[s]everal decisions of the Court of Appeal [had] ***extended the holding*** in *City of San Jose* to permit the filing of class claims seeking tax refunds, ***reasoning by analogy*** to the claims statute construed in *City of San Jose* that the existing tax-refund statutes could and should be interpreted to authorize the filing of class claims." (*Woosley*, *supra*, 3 Cal.4th at p. 788, emphasis added.) Critically, none of those Court of Appeal decisions analyzed statutes that permitted claims to be filed by a claimant or by "a person on his or her behalf," or contained similar express permission of representative claims as section 910 does. (See *Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029, 1033 [170 Cal.Rptr. 400] [property tax claim statute required the claim to be "[v]erified by the person who paid the tax, his guardian, executor, or administrator"]; *Lattin v. Franchise Tax Board* (1977) 75 Cal.App.3d 377, 381 [142 Cal.Rptr. 130] [income tax statute required that "[e]very claim for refund shall be in writing and shall state the specific grounds upon which it is founded"]; *Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 Cal.App.3d 244, 248-249 [120 Cal.Rptr. 609] [sales tax statute provided that "[e]very claim shall be in writing and shall state the specific grounds upon which the claim is founded"].)

In *Woosley* this Court held that "[w]ithin the context of [Veh. Code, § 42231], the term 'person' does not include a class...." (*Woosley*, *supra*, 3 Cal.4th at p. 790.) Nothing in *Woosley*, however, suggests that this Court

overruled *City of San Jose* or that section 910 can have two different meanings depending on the identity of the claimant or whether the claim filed is for return of illegally collected taxes or something else. Therefore, *Woosley* did not change the holding in *City of San Jose* that class claims are permitted under section 910 of the Government Code. (See *Oronoz*, *supra*, 159 Cal.App.4th at p. 365 ["*Woosley* did not disapprove [*City of*] *San Jose*"].)

Contrary to the majority's conclusion that this Court's opinion in *Woosley* turned on the nature of the claims asserted, i.e., tax refund claims versus inverse condemnation and nuisance claims (*Ardon, supra*, 174 Cal.App.4th at pp. 383-384), the opinion turned on the fact that the Legislature had provided specific refund statutes for the taxes at issue in *Woosley* rather than section 910, none of which allowed claims to be filed by the claimant "or by a person acting on his or her behalf." (*Id.* at p. 382.)

Rather than announcing a broad, general rule that class claims for tax refunds are impermissible, the *Woosley* Court analyzed the specific tax refund statutes before it, namely Vehicle Code section 42231 and Revenue and Taxation Code sections 6901 et seq., to determine whether class claims were permitted under those specific statutes. (*Woosley*, *supra*, 3 Cal.4th at p. 790.) Vehicle Code section 42231 required claims to be filed by "*person[s] who [ ] paid the erroneous or excessive fee or penalty, or* ***his agent on his behalf***." "Agency" is a legally defined concept and does not include a class representative. (*Woosley, supra*, 3 Cal.4th at p. 790, citing Civ. Code, §§ 2299, 2300; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency & Employment, § 36-40, pp. 49-52.) Therefore, this Court explicitly concluded that "*[w]ithin the context of [that] statute*," a class claim was not permitted. (*Woosley, supra*, 3 Cal.4th at p.790, italics in original.) As to Revenue and Taxation Code sections 6901 et seq., this Court studied "the entire statutory scheme" and determined that "class

claims were not contemplated" because the refund procedures provided therein required that notice of any deficiency determination "must be given to each individual taxpayer," which would have been inconsistent with the use of a class claim procedure where notice of deficiencies would only be sent to the class representative. (*Woosley, supra*, 3 Cal.4th at pp. 790-91.)

In stark contrast to the two statutes before the *Woosley* Court, section 910 expressly allows for: (1) claims to be presented by the claimant or "by a person acting on his or her behalf," (2) the claim form to be signed "by the claimant or by some person on his behalf," and (3) a single designated post office address "to which the person presenting the claim desires notices to be sent." (Gov. Code, §§ 910, 910(b), 910.2.)

Woosley does not say that strict compliance with claims statutes is required in tax refund cases. What *Woosley* does require is that a court analyze the claims statutes before it to determine whether the Legislature intended to allow class claims under those statutes. (*Woosley*, *supra*, 3 Cal. 4th at p. 790 ["***Within the context of this statute***, the term 'person' does not include a class"], emphasis added.) Here, the relevant claims statute is indisputably section 910 and, as this Court held in *City of San Jose*, class claims are permitted under section 910. In the 35 years following *City of San Jose*, the Legislature has not disagreed.

E. *Woosley* Did Not Establish A Broad Policy Prohibiting Class Claims In Tax Refund Cases

Contrary to *Ardon*, there is no policy underlying *Woosley* that leads to a general prohibition of class claims in tax refund cases. The opinion below references a "line" of cases purportedly "follow[ed]" by *Woosley* which "broadly construed" article XIII, section 32, namely *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 639 (*State Bd. of Equalization*), *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 283 [165 Cal.Rptr.122, 611 P.2d 463] (*Pacific Gas*

& Electric), and *Modern Barber Colleges v. Cal. Emp. Stabilization Com.* (1948) 31 Cal.2d 720, 731-32 [192 P.2d 916] (*Modern Barber*). As the court below asserted, "These cases emphasized that article XIII, section 32 serves the important purpose of prohibiting an unplanned disruption of revenue collection, so that essential public services dependent on the funds are not ***unnecessarily*** interrupted." (*Ardon, supra*, 174 Cal.App.4th at p. 381, emphasis added, internal quotations and citations omitted.)

However, what the court below omitted from its discussion of those cases was that in each one, the plaintiff was attempting to obtain equitable relief to prevent the collection of a tax ***before its payment***. This Court, in each of those cases, stated that the policy underlying article XIII, section 32 was to bar pre-payment injunctions, judicial declarations or findings which would impede the prompt collection of a tax.[16] So, the "unnecessar[y]" and "unplanned disruption" that article XIII, section 32 seeks to prevent by its "pay first, litigate later rule" is the disruption an injunction or other equitable remedy would cause to tax collections if it were issued ***prior to the payment of the tax*** and ***prior to a decision on the merits***. The court below, however, took this prohibition on pre-payment tax litigation and converted it into a policy against class actions – a policy not found in this "line of Supreme Court cases." (*Ardon, supra*, 174 Cal.App.4th at p. 381.)

Furthermore, the policy considerations at issue in *Woosley* have no application here since article XIII, section 32 of the California Constitution, by its express terms and as construed by opinions of this Court, applies only to actions against the State, as discussed *infra*. Moreover, Ardon paid the

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[16] See *State Bd. Of Equalization, supra*, 39 Cal.3d at p. 638 ("The important public policy behind this constitutional provision 'is to allow revenue collection to ***continue during litigation*** so that essential public services dependent on the funds are not ***unnecessarily*** interrupted.'") (quoting *Pacific Gas & Electric, supra*, 27 Cal.3d at p. 283, emphasis added.)

disputed tax before filing suit, so the prohibition of pre-payment litigation does not apply.

Here, the individual tax refund amounts are small and difficult for each taxpayer to determine on their own (if they even know about the tax), and the City has continued to unlawfully collect the tax even after it became clear that the tax was illegal (unlike the IRS, which voluntarily ceased collection of the FET and established a simple, specific refund mechanism for return of tax monies). These circumstances demonstrate the importance of the class action mechanism. Claims for refund of the individually small TUT are the type that fit most perfectly under the rule allowing class claims, because without a class claim procedure TUT taxpayers would, for all practical purposes, be left without any remedy whatsoever.[17] As this Court recognized 38 years ago in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807 [94 Cal.Rptr. 796]:

> Modern society seems increasingly to expose men to ... group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is

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[17] Taxpayers are also powerless to require service providers to seek refunds on their behalf. Section 799 of the California Public Utilities Code provides:

> In any action seeking to enjoin collection of taxes imposed on customers of utilities ... in any action seeking declaratory relief concerning the taxes, in any action seeking a refund of the taxes, or in any action seeking otherwise to invalidate the taxes, ***the sole necessary party defendant in the action shall be the local jurisdiction*** on whose behalf the taxes are collected ***and the public utility or other service supplier collecting the taxes shall not be named as a party in the action.***

(Pub. Util. Code, § 799(a)(4), emphasis added.)

> any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.

(*Id.*, internal quotations and citation omitted.)

Giving effect to *Ardon's* misinterpretation of the policy underlying article XIII, section 32 would give overreaching governments free rein to impose improper fees and taxes.

III. THE COURT OF APPEAL INCORRECTLY APPLIED ARTICLE XIII, SECTION 32 AND THE POLICY BEHIND IT

A. Article XIII, Section 32 Does Not Apply To Actions Against Local Government Entities For The Refund Of Local Taxes

Ardon relies on an overbroad interpretation of article XIII, section 32 that is unsupported by its text and conflicts with this Court's prior decisions.

Article XIII, section 32 of the California Constitution provides:

> No legal or equitable process shall issue in any proceeding in any court ***against this State or any officer thereof*** to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

(Emphasis added.)

As Justice Croskey recognized in his dissent, article XIII, section 32 is inapplicable to actions against local public entities for the refund of local taxes because "it applies only to actions against the state." (*Ardon, supra*, 174 Cal.App.4th at p. 388 (dis. opn. of Croskey, J.), citing *Pacific Gas & Electric, supra*, 27 Cal.3d at p. 281, fn. 6; *Oronoz, supra*, 159 Cal.App.4th at p. 363, fn. 6.)

This Court confirms Justice Croskey's interpretation in at least three opinions. First, in *Eisley v. Mohan* (1948) 31 Cal.2d 637, 641 [192 P.2d 5] (*Eisley*) this Court held that the predecessor to section 32, or article XIII, section 15, "applies only to an action against the state or an officer thereof with respect to his duties in assessing or collecting a state tax for state purposes."[18] Then, in *Pacific Gas & Electric*, this Court specifically stated, "Section 32 applies only to actions against the state." (*Pacific Gas & Electric*, *supra*, 27 Cal.3d at p. 282, fn. 6 (citing *Eisley*, *supra*, 31 Cal.2d at p. 641).) Finally, this Court in *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 822, fn. 5 [107 Cal.Rptr.2d 369, 23 P.3d 601] (*La Habra*) stated, "Article XIII, section 32... [does not] appl[y] to this action against two local governments."

The majority did not dispute this Court's prior rulings but rather invoked a purported ***policy*** underlying section 32 and applied that policy, rather than section 32 itself, in this action against a local public entity for the refund of local taxes. However, as Justice Croskey further stated in his dissent:

> Many statutes and constitutional provisions are motivated by policies that, construed broadly, would support provisions broader than those actually enacted. To apply the policy underlying a provision rather than the provision itself means, essentially, rewriting the provision by substituting the court's own determination as to the desired scope of the law for that of the enacting body.

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[18] "A similar provision [to article XIII, section 32] appeared in former article XIII, section 15 of the California Constitution until November 1974, when the voters repealed former article XIII and added a new article XIII, including section 32 (Assem. Const. Amend. No. 32, Stats. 1974 (1973-1974 Reg. Sess.) res. ch. 70, pp. 3678, 3690.) *Pacific Gas & Electric*, *supra*, 27 Cal.3d at p. 280, fn. 3, characterized this constitutional amendment as one of 'numerous minor revisions and renumberings' of essentially the same provision." (*Ardon, supra*, 174 Cal.App.4th at p. 388, fn. 2 (dis. opn. of Croskey, J.).)

(*Ardon, supra*, 174 Cal.App.4th at p. 388 (dis. opn. of Croskey, J.).)

For this extension of the scope of article XIII, section 32 the Court of Appeal relied on "a line" of Court of Appeal decisions that applied the purported policy underlying article XIII, section 32 to local taxes, i.e., *Neecke, supra*, 39 Cal.App.4th 946, *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 79 [65 Cal.Rptr.3d 716] (*Batt*), *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475 [91 Cal.Rptr.2d 603] (*Writers Guild*), and *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1137 [113 Cal.Rptr.2d 690] (*Flying Dutchman*).

However, *Batt*, in what the *Oronoz* Court characterized as "overbroad dictum" (*Oronoz*, *supra*, 159 Cal.App.4th at p. 365), relies entirely on *Flying Dutchman* and *Writers Guild* for the proposition that article XIII, section 32 is equally applicable to local governments. (*Batt*, *supra*, 155 Cal.App.4th at pp. 79, 84.) *Flying Dutchman*, in turn, relies entirely on *Writers Guild* for that same extension of law. (*Flying Dutchman*, *supra*, 93 Cal.App.4th at pp. 1136-37 ["Until recently, no law existed on precisely this question"].) The *Writers Guild* court recognized it could not cite to any authority, yet it extended the purported "public policy" underlying article XIII, section 32 to an action against a local government simply because it "[saw] no reason why [it] should not." (*Writers Guild*, *supra*, 77 Cal.App.4th at p. 483.)

This departure from section 32's plain language and this Court's precedent lacks merit and should be overruled.

Moreover, although *Neecke*, *supra*, 39 Cal.App.4th at 962, extended the reasoning of *Woosley* to apply to claims for refund of local taxes, the *Neecke* court was not applying section 910 and only did so since the plaintiff had filed a claim for a tax refund pursuant to a different specific tax refund statute enacted by the Legislature: Revenue & Taxation Code

section 5097. (*Neecke*, *supra*, 39 Cal.App.4th at p. 951.) Clearly, *Neecke* "did not hold that class claims were impermissible under section 910 or apply the strict compliance test to claims under section 910." (*Oronoz*, *supra*, 159 Cal.App.4th at p. 365.)[19]

B. The Court Of Appeal Also Misconstrued The Policy Behind Article XIII, Section 32

The majority's position that the policy behind section 32 is to give governmental entities "sufficient notice of claims to allow for predictable and reliable fiscal planning" (*Ardon, supra*, 174 Cal.App.4th at p. 381) rests upon an incomplete citation from *Woosley*.

Although *Woosley* states that section 32 "rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues," (*Woosley*, *supra*, 3 Cal.4th at p. 789), the *Woosley* Court's immediately subsequent citation to *State Bd. Of Equalization*, *supra*, 39 Cal.3d at p. 638, and a plain reading of section 32 are telling. As this Court stated in *State Bd. of Equalization*:

> The important public policy behind this constitutional provision 'is to allow revenue collection to continue ***during litigation*** so that essential public services dependent on the funds are not unnecessarily interrupted.' ... 'The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to ***the delays of litigation*** is unreason.' ... The constitutional provision has been construed broadly to bar not only injunctions but also a variety of

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[19] As in *Neecke*, *Rickley* concerned property taxes collected pursuant to the Revenue and Taxation Code, a specific tax refund statute enacted by the Legislature. (*Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1004 [8 Cal.Rptr.3d 406].) Moreover, *Macy's* merely recognizes that *Flying Dutchman* rejected the argument that article XIII, section 32 applies only to statewide taxes. (*Macy's Dept. Store, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, 1457, fn. 23 [50 Cal.Rptr.3d 79].)

> ***prepayment*** judicial declarations or findings which would impede the prompt collection of a tax.

(*State Bd. of Equalization*, *supra*, 39 Cal.3d at pp. 638-639, emphasis added and internal quotations and citations omitted.)[20]

The public policy behind article XIII, section 32 is not "fiscal certainty" at the expense of justice and appropriate class action remedies, but merely one that prevents courts from enjoining the collection of a tax prior to the conclusion of the litigation. Once the taxpayer pays the tax, he or she may then seek a refund of the tax from the state "in such manner as may be provided by the Legislature." (Cal. Const., art. XIII, § 32.) No one disputes that Mr. Ardon paid the tax at issue prior to presenting a claim and filing this action. He also sought a refund "in such manner as ... provided by the Legislature" in section 910. Therefore, the true policy behind article XIII section 32 is not implicated here.

Critically, as this Court has recognized, a policy favoring the predictability of revenue forecasting "'is not a trump card that somehow requires the courts to countenance *ultra vires* or illegal tax practices.'" (*La Habra*, *supra*, 25 Cal.4th at p. 824.) No governmental entity is entitled to keep the proceeds of illegally collected taxes. While the IRS has made efforts to disgorge the proceeds of its illegal collection efforts, the City of Los Angeles has refused to do so.

In sum, as Justice Croskey noted in his dissenting opinion below, the Court of Appeal's decision is based on an incorrect interpretation and application of the policy of article XIII, section 32 of the California Constitution. That provision of the Constitution does not bar class claims

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[20] See also *Pacific Gas & Electric*, *supra*, 27 Cal.3d at p. 283 ("The policy behind section 32 is to allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted.") (citing *Modern Barber Colleges, supra,* 31 Cal.2d at p. 726.)

against local public entities for the refund of local taxes under section 910 because it only applies to actions against the State. Furthermore, the public policy of preventing courts from enjoining the collection of a tax prior to its payment is not applicable here.

C. Even Assuming Art. XIII Sec. 32 Applies, It Makes No Difference Here

Even assuming article XIII, section 32 of the Constitution applies to claims against local government entities (which it does not), it makes no difference to the outcome here. Even if applicable, article XIII, section 32 merely requires that the taxpayer pay the tax and then seek a refund of the tax pursuant to the applicable claims statute. Here, the Legislature has expressly provided that claims under section 910 may be filed by a representative person on behalf of other claimants and has further provided that such claims are subject to a substantial compliance standard.

Courts do not require strict *compliance* with claim requirements because doing so results in the denial of meritorious claims based on minor technical errors. (See *Mission Hous. Dev. Co. v. City & County of San Francisco, supra*, 59 Cal.App.4th at p. 70 [explaining that while its decision in *Neecke, supra*, 39 Cal.App.4th 946, "spoke in terms of requiring strict compliance with the administrative procedures established by the Legislature for tax refund claims[,] ... [t]he pertinent issue in both *Neecke* and *Woosley*, however, was one of standing, i.e., whether the plaintiffs in those cases could maintain class actions under the applicable tax code provisions"].)

Woosley merely says that *if* article XIII, section 32 applies, then a court may not expand the procedures provided for by the Legislature. That is similar to the concept of strict *construction* of statutes (not strict compliance). However, even assuming that article XIII, section 32 applies to the claims here, and further assuming that strict construction is required,

the Legislature has expressly permitted representative claims under section 910.

There are no magic words that must be invoked by the Legislature to permit a class claim, absent which all class claims will be prohibited. "[T]the rule of strict construction does not require that the narrowest possible meaning be given." (*Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729, 735 [221 P.2d 31].) Instead, a "fair and reasonable interpretation must be made of all laws, with due regard for the ordinary acceptation of the language employed...." (*Id.*) "[S]trict construction does not mean strained construction." (*Safeco Ins. Co. v. Gilstrap* (1983) 141 Cal.App.3d 524, 533 [190 Cal.Rptr. 425].)

When given their ordinary meaning, the words of the GCA clearly contemplate the filing of representative claims. The GCA allows (1) claims to be presented by the claimant or "by a person acting on his or her behalf," (2) the claim form to be signed "by the claimant or by some person on his behalf," and (3) a single designated post office address "to which the person presenting the claim desires notices to be sent." Taken at their ordinary meaning, those words allow class claims, as *City of San Jose* held. Nothing more is needed.

CONCLUSION

This Court held thirty-five years ago in *City of San Jose* that class claims are permitted under section 910. The Legislature has never sought to narrow or overturn that holding. The Opinion of the Court of Appeal effectively precludes any effective remedy or meaningful redress whatsoever to taxpayers who have been subjected to illegal taxation. It is respectfully submitted that the decision below should be reversed.

DATED: October 9, 2009

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

The text of this reply consists of 9,229 words as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

DATED: October 9, 2009

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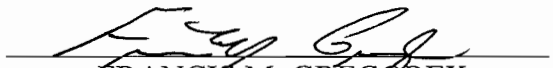

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DECLARATION OF SERVICE

I, Maureen Longdo, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California. 92101.

2. That on October 9, 2009, declarant served the OPENING BRIEF ON THE MERITS via Federal Express Overnight Delivery in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of October 2009, at San Diego, California.

Maureen Longdo

MAUREEN LONGDO

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APPENDIX A

tax upon that person would be in violation of the Constitution of the United States or that of the State of California. **(Amended by Ord. No. 135,276, Eff. 10/30/67.)**

SEC. 21.1.3. TELEPHONE USERS TAX.

(a) There is hereby imposed a tax upon every person in the City of Los Angeles using telephone communication services including services for intrastate, interstate or international calls, services for mobile cellular telephone communication when the owner or lessee of the telephone has a billing address in the City, and using any teletypewriter exchange services in the City of Los Angeles. The tax imposed by this section shall be at the rate of 10 percent of the charges made for such services and shall be paid by the person paying for such services; provided, however, that as to any non-profit educational institution, as defined in Subdivision 3 of Subsection (c) of Section 21.190 of this Code, and as to the charges made for services to any independent telemarketing agency, as defined in Section 21.80 of this Code, incurred solely in performing the functions of an independent telemarketing agency, the tax imposed by this section shall be at the rate of 5 percent of the charges made for such services. **(Second Sentence Amended by Ord. No. 171,436, Eff. 1/10/97.)** Interstate calls shall be deemed to include calls to the District of Columbia. **(Amended by Ord. No. 168,874, Eff. 8/9/93.)**

(b) As used in this section, the term **"charges"** shall not include charges for services paid for by inserting coins in coin–operated telephones except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due; nor shall the term **"telephone communication services"** include land mobile services or maritime mobile service as defined in Section 2.1 or Title 47 of the Code of Federal Regulations as such section existed on October 1, 1967. **(Amended by Or. No. 136,501, Eff. 6/8/68.)**

(c) The tax imposed in this section shall be collected from the service user by the person providing the telephone communication services or the teletypewriter exchange services. The amount of tax collected from the 26th day of each month through the 25th day of the following month shall be remitted to the Director of Finance on or before the 26th day of such following month, or, at the option of the person required to collect and remit the tax, an estimated amount of tax collected, measured by the billings of the previous month, shall be remitted to the Director of Finance on or before the 20th day of each month. **(First sentence (c) Amended by Ord. No. 162,586, Eff. 8/15/87.)**

(d) Notwithstanding the provisions of Subsection (a), the tax imposed under this section shall not be imposed upon any person for using telephone communications services or teletypewriter exchange services, to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under Sec. 4251 of Title 26 of the United States Code, as such Section existed on November 1, 1967. **(Amended by Ord. No. 162,586, Eff. 8/15/87.)**

(e) To prevent actual multiple taxation of any service that is subject to tax under Subsection (a) of this section and which consists of a call that originates or terminates outside of the City of Los Angeles, any service user, upon proof that such service user has paid a tax in another taxing jurisdiction on such call, shall be allowed a credit against the tax imposed in Subsection (a) of this section to the extent of the amount of such tax properly due and paid in such other taxing jurisdiction. However, no credit may be allowed for any tax paid to another taxing jurisdiction on any call to the extent that such call may not, under the Constitution and statutes of the United States, be made the subject of taxation by such other taxing jurisdiction. **(Added by Ord. No. 168,874, Eff. 8/9/93.)**

(f) Any person claiming to be an independent telemarketing agency which has charges subject to tax at the 5 percent rate shall file an application for rate adjustment with the Director of Finance. Such

application shall be made on forms provided by the Director of Finance and shall recite facts under oath which qualify the applicant for the 5 percent tax rate. Notwithstanding any other provision of this article, the 5 percent rate shall apply only to charges for services which were necessarily incurred solely and exclusively for telemarketing activities. The burden of maintaining records and establishing that any such charge is subject to tax at the 5 percent rate shall be on the applicant. Charges for all other services shall be subject to tax at the 10 percent rate. **(Added by Ord. No. 171,436, Eff. 1/10/97.)**

SEC. 21.1.4. ELECTRICITY USERS TAX.

(Amended by Ord. No. 142,333, Eff. 9/30/71, Oper. 10/1/71.)

(a) There is hereby imposed a tax upon every person in the City of Los Angeles using electrical energy in the City of Los Angeles. The tax imposed by this section shall be at the rate of 10 percent of the charges made for such energy and shall be paid by the person paying for such energy, provided, however, that commercial or industrial users of electrical energy shall be subject to tax and a tax is hereby imposed upon them at the rate of 12.5 percent of the charges made for such energy, but as to any non-profit educational institution, as defined in Subdivision 3 of Subsection (c) of Section 21.190 of this Code, the tax imposed by this section shall be at the rate of 10 percent of the charges made for such energy. **(Second Sentence Amended by Ord. No. 171,436, Eff. 1/10/97.)** **"Charges"** as used in this section, shall include charges made for (1) metered energy, and (2) minimum charges for service, including customer charges, service charges, demand charges, standby charges, and annual and monthly charges.

The term **"commercial or industrial users"** as used in this section, is intended to include, but shall not be limited to, any person who qualifies as a "commercial or industrial" consumer of electrical energy within the electric rate schedules of the Department of Water and Power of the City of Los Angeles or the tariff schedules of the Southern California Edison company, provided however, a user of electrical energy shall not be considered a **"commercial or industrial user"** of any electrical energy supplied to a single family accommodation separately metered or for energy to two or more individual family accommodations supplied as a unit, upon application under the provisions of the Department's Domestic Service Schedule D–1, devoted primarily to domestic, residential, household and related purposes, as distinguished from commercial, professional, and industrial purposes.

(b) As used in this section, the term **"using electrical energy"** shall not be construed to mean that storage of such energy by a person in a battery owned or possessed by him for use in an automobile or other machinery or device apart from the premises upon which the energy was received, provided however, that the term shall include the receiving of such energy for the purpose of using it in the charging of batteries, nor shall the term include the mere receiving of such energy by an electric public utility or government agency at a point within the City of Los Angeles for resale. **(Amended by Ord. No. 135,276, Eff. 10/30/67.)**

(c) The tax imposed in this section shall be collected from the service user by the person supplying such energy. The amount of tax collected from the 26th day of each month through the 25th day of the following month shall be remitted to the Director of Finance on or before the 26th day of such following month, or, at the option of the person required to collect and remit the tax, an estimated amount of tax collected in each month shall be remitted to the Director of Finance on or before the 26th day of such month. **(Amended by Ord. No. 156,573, Eff. 5/10/82)**

SEC. 21.1.5. GAS USER TAX.

(a) **(Amended by Ord. No. 169,245, Eff. 1/15/94.)** There is hereby imposed a tax upon every

but not less than $5.00. The penalty shall become part of the tax herein required to be paid.

SEC. 21.1.11. RECORDS.

It shall be the duty of every person required to collect and remit to the City any tax imposed by this article to keep and preserve, for a period of three years, all records as may be necessary to determine the amount of such tax as he may have been liable for the collection of and remittance to the Director of Finance, which records the Clerk shall have the right to inspect at all reasonable times.

SEC. 21.1.12. SENIOR CITIZEN EXEMPTION – REFUNDS.

(a) The tax imposed by this article shall not apply to any individual 62 years of age or older or any disabled individual who uses telephone, electric, or gas services in or upon any premises occupied by such individual, provided the combined adjusted gross income (as used for purposes of the California Personal Income Tax Law) of all members of the household in which such individual resided was less than Ten Thousand Nine Hundred and Fifty Dollars ($10,950) for the calendar year prior to the fiscal year (July 1 through June 30) for which the exemption provided in this Article is applied for. **(Amended by Ord. No. 157,563, Eff. 5/2/83, Oper. 6/1/83.)**

For the purposes of this section, an individual shall be considered to be disabled if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.

The exemption granted by this section shall not eliminate the duty of the service supplier from collecting taxes from such exempt individuals or the duty of such exempt individuals from paying such taxes to the service supplier unless an exemption is applied for by the service user and granted in accordance with the provisions of Subsection (b) hereof.

For each fiscal year commencing with the 1984-85 fiscal year the Director of Finance is directed to determine, and utilize as the prior calendar year's adjusted gross income limitation, the figure in effect on the preceding first day of April as the "very low income" limitation for a family of two persons in the City of Los Angeles under the Section 8 housing programs of the United States Housing Act of 1937, as amended, as published by the United States Department of Housing and Urban Development. **(Added by Ord. No. 157,563, Eff. 5/2/83, Oper. 6/1/83.)**

(b) **(Amended by Ord. No. 146,936, ff. 3/7/75.)** Any service user exempt from the taxes imposed by this Article because of the provisions of Subsection (a) above, may file an application with the Director of Finance for an exemption. Such applications shall be made upon forms supplied by the Director of Finance and shall recite facts under oath which qualify the applicant for an exemption. The Director of Finance shall review all such applications and certify as exempt those applicants determined to qualify therefor and shall notify all service suppliers affected that such exemption has been approved, stating the name of the applicant, the address to which such exempt service is being supplied, the account number, if any, and such other information as may be necessary for the service supplier to remove the exempt service user from its tax billing procedure. Upon receipt of such notice, the service supplier shall not be required to continue to bill any further tax imposed by this article from such exempt service user until further notice by the Director of Finance is given. The service supplier shall eliminate such exempt service user from its tax billing procedure no later than 60 days after the receipt of such notice from the Director of Finance.

All applications for exemption for any given fiscal year shall be filed with the Director of Finance on or before the 30th day of April preceding such fiscal year. All exemptions shall continue and be renewed

APPENDIX B

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Presentation of Claims Against Public Entities

January 1959

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Presentation of Claims Against Public Entities

The law of this State contains many statutes and county and city charters and ordinances which bar suit against a governmental entity for money or damages unless a written statement or "claim" setting forth the nature of the right asserted against the entity, the circumstances giving rise thereto and the amount involved is communicated to the entity within a relatively short time after the claimant's cause of action has accrued. Such provisions are referred to in this Recommendation and Study as "claims statutes."

Claims statutes have two principal purposes. First, they give the governmental entity an opportunity to settle just claims before suit is brought. Second, they permit the entity to make an early investigation of the facts on which a claim is based, thus enabling it to defend itself against unjust claims and to correct the conditions or practices which gave rise to the claim.

The principle justifying claims statutes has been extensively accepted in California over a long period of time. Claims statutes appeared as early as 1855. Today there are at least 174 separate claims provisions in the law of this State, scattered through statutes, charters, ordinances and regulations. As appears below and more fully in the research consultant's report, these provisions differ widely as to many material matters, including claims covered, time for filing, and information required to be furnished.

It has become increasingly clear in recent years that the implementation of the claims statute principle in this State by the enactment of numerous and conflicting claims provisions has created grave problems both for governmental entities and those who have just claims against them. The Law Revision Commission was, therefore, authorized and directed to study and analyze the various provisions of law relating to the filing of claims against public bodies and public employees to determine whether they should be made uniform and otherwise revised.[1] The Commission has made an exhaustive study of existing claims statutes and the judicial decisions interpreting and applying them.

On the basis of this study the Commission has concluded that the law of this State governing the presentation of claims against governmental entities is unduly complex, inconsistent, ambiguous and difficult to find, that it is productive of much litigation and that it often results in the barring of just claims. This conclusion is supported by the following facts among others disclosed by the Commission's study:[2]

1. There are at least 174 separate claims provisions in California. Yet a large number of cities, districts and other local entities are not protected by any claims statute.

[1] Cal. Stat. 1956, res. c. 35, p. 256.
[2] For a more complete statement of the defects in existing claims statutes see research consultant's study, *infra* at A-17.

DIVISION 3.5. CLAIMS AGAINST THE STATE, LOCAL PUBLIC ENTITIES AND OFFICERS AND EMPLOYEES

CHAPTER 2. CLAIMS AGAINST LOCAL PUBLIC ENTITIES

Article 1. General

700. As used in this chapter, "local public entity" includes any county or city and any district, local authority or other political subdivision of the State but does not include the State or any office, officer, department, division, bureau, board, commission or agency thereof claims against which are paid by warrants drawn by the Controller.

701. Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, cities and counties and cities and against officers, agents and employees thereof, this chapter shall not apply to a chartered county or city while it has a claims procedure prescribed by charter or pursuant thereto.

702. This chapter applies only to claims relating to causes of action which accrue subsequent to its effective date.

703. Articles 1 and 2 of this chapter apply to all claims for money or damages against local public entities except:

(a) Claims under the Revenue and Taxation Code or other provisions of law prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers' or materialmen's liens.

(c) Claims by public officers and employees for fees, salaries, wages, mileage or other expenses and allowances.

(d) Claims for which the workmen's compensation authorized by Division 4 of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims which relate to a special assessment constituting a specific lien against the property assessed and which are payable from the proceeds of such an assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the State or a department or agency thereof or by another local public entity.

704. A claim against a local public entity presented in substantial compliance with any other applicable claims procedure established by

APPENDIX C

referee without any previous order having been made for temporary custody of a person subject to the jurisdiction of the court, the referee shall also, from time to time, recommend to the court such orders for temporary custody as seem necessary.

Utilization of findings and recommendations

SEC. 3. Section 578 of said code is amended to read:

578. Upon the presentation of the findings and recommendations of the referee, the court may make such order in the case as it deems proper, or, after such notice as it deems proper to the persons interested in the case, may hear additional testimony or evidence and may approve or set aside the findings and recommendations of the referee, or may re-refer the case for the taking of further testimony or the making of further recommendations by the referee.

Repeals

SEC. 4. Sections 577 and 578.1 of said code are repealed.

CHAPTER 1723

An act to add Section 752 to the Welfare and Institutions Code, relating to the expunging of juvenile court records and other records relating to wards of the juvenile court.

In effect September 18, 1959

[Approved by Governor July 9, 1959. Filed with Secretary of State July 10, 1959.]

The people of the State of California do enact as follows:

SECTION 1. Section 752 is added to the Welfare and Institutions Code, to read:

752. In any case in which a person became a ward of the juvenile court for the reasons described in subdivisions (f), (g), (h), (i), (j), (k), (m), or (n) of Section 700, or any other reason involving misconduct by such person, such person, or the county probation officer, may, five years or more after the jurisdiction of the juvenile court has terminated as to such person, petition the court for expungement of the records, including records of arrest, relating to such person's case, in the custody of the juvenile court and probation officer and such other agencies, including law enforcement agencies, and public officials, as petitioner alleges, in his petition, to have custody of such records. The court shall notify the district attorney of the county and the county probation officer, if he is not the petitioner, of the petition, and such district attorney or probation officer or any of their deputies or any other person having relevant evidence may testify at the hearing on the petition. If, after hearing, the court finds that since such termination of jurisdiction he has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order expunged all records, papers, and exhibits in such person's case in the custody of the juvenile court, including the juvenile court record, minute book entries, and entries on dockets, and other records relating to the case, in the custody of such other agencies and officials as are named in the order. Thereafter the proceedings in such case shall be deemed never to have occurred. The court shall send a copy of the order to each agency and official named therein, and each such agency and official shall expunge records in its custody as directed by the order.

Stats. 1959, CHAPTER 1724

An act to add Division 3.5 (commencing with Section 700) to Title 1 of the Government Code, to repeal Section 342 of the Code of Civil Procedure and to add Sections 313 and 342 to said code, relating to claims against the State, local public entities and public officers and employees.

[Approved by Governor July 9, 1959. Filed with Secretary of State July 10, 1959.]

In effect September 18, 1959

The people of the State of California do enact as follows:

SECTION 1. Division 3.5 (commencing with Section 700) is added to Title 1 of the Government Code, to read:

DIVISION 3.5. CLAIMS AGAINST THE STATE, LOCAL PUBLIC ENTITIES AND OFFICERS AND EMPLOYEES

CHAPTER 2. CLAIMS AGAINST LOCAL PUBLIC ENTITIES

Article 1. General

"Local public entity"

700. As used in this chapter, "local public entity" includes any county or city and any district, local authority or other political subdivision of the State but does not include the State or any office, officer, department, division, bureau, board, commission or agency thereof claims against which are paid by warrants drawn by the Controller.

Adoption of constitutional amendment

701. Until the adoption by the people of an amendment to the Constitution of the State of California confirming the authority of the Legislature to prescribe procedures governing the presentation, consideration and enforcement of claims against chartered counties, chartered cities and counties and chartered cities and against officers, agents and employees thereof, this chapter shall not apply to causes of action founded on contract against a chartered city and county or chartered city while it has an applicable claims procedure prescribed by charter or pursuant thereto.

Causes of action affected

702. This chapter applies only to claims relating to causes of action which accrue subsequent to its effective date.

Exemptions

703. Articles 1 and 2 of this chapter apply to all claims for money or damages against local public entities except:

(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of

any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers' or materialmen's liens.

(c) Claims by public officers and employees for fees, salaries, wages, mileage or other expenses and allowances.

(d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims which relate to a special assessment constituting a specific lien against the property assessed and which are payable from the proceeds of such an assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the State or a department or agency thereof or by another local public entity.

(j) Claims arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed.

(k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 of Chapter 1 of Part 7 of Division 2 of the Labor Code (commencing at Section 1720).

Claim made under prior law

704. A claim against a local public entity presented in substantial compliance with any other applicable claims procedure established by or pursuant to a statute, charter or ordinance in effect immediately prior to the effective date of this chapter shall satisfy the requirements of Articles 1 and 2 of this chapter, if such compliance takes place before the repeal of such statute, charter or ordinance or before July 1, 1964, whichever occurs first. Section 716 is applicable to claims governed by this section.

Claim procedure as established by agreement

705. The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or officer thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising

out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body. A claims procedure established by an agreement made pursuant to this section exclusively governs the claims to which it relates, except that the agreement may not require a shorter time for presentation of claims than the time provided in Section 715, and that Section 716 is applicable to all such claims.

Article 2. Presentation, Consideration and Enforcement of Claims

Necessity of written claim

710. No suit for money or damages may be brought against a local public entity on a cause of action for which this chapter requires a claim to be presented until a written claim therefor has been presented to the entity in conformity with the provisions of this article.

Contents

711. A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

(a) The name and post office address of the claimant;

(b) The post office address to which the person presenting the claim desires notices to be sent;

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; and

(e) The amount claimed as of the date of presentation of the claim, together with the basis of computation thereof.

The claim shall be signed by the claimant or by some person on his behalf.

A claim may be amended at any time, and the amendment shall be considered a part of the original claim for all purposes.

Insufficiency of claim: Notice

712. If in the opinion of the governing body of the local public entity a claim as presented fails to comply substantially with the requirements of Section 711 the governing body may, at any time within fifty (50) days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein.

Such notice may be given by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notices to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim.

The governing body may not take action on the claim for a period of twenty (20) days after such notice is given. A failure or refusal to amend the claim shall not constitute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Section 711.

Article 3. Claims Procedures Established by Local Public Entities

Claims procedures established by local public entities

730. Claims against a local public entity for money or damages which are excepted by Section 703 from Articles 1 and 2 of this chapter, and which are not governed by any other statutes or regulations expressly relating thereto, shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity. The procedure so prescribed may include a requirement that a claim be presented as a prerequisite to suit thereon, but may not require a shorter time for presentation of any claim than the time provided in Section 715 of this code, and Section 716 of this code shall be applicable to all claims governed thereby.

epeal

SEC. 2. Section 342 of the Code of Civil Procedure is hereby repealed.

SEC. 3. Section 313 is added to the Code of Civil Proeedure, to read:

eneral ocedure

313. The general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages against the State of California, counties, cities, cities and counties, districts, local authorities, and other political subdivisions of the State, and against the officers and employees thereof, is prescribed by Division 3.5 (commencing with Section 600) of Title 1 of the Government Code.

lor claims

SEC. 4. Nothing in this act shall be deemed to allow suit or reinstate claims which have been denied or barred prior to the effective date of this act, including but not limited to claims under the Revenue and Taxation Code which have been denied or barred by the provisions of the Government Code.

CHAPTER 1725

An act to repeal Sections 29700, 29700.1, 29701, 29702, 29703, 29704, 29705, 29707, 29711, 29713, 29714, 29714.1, 29715, 29716, 29720, to add Sections 29700 and 29706, to renumber Section 29719, to renumber and amend Sections 29706, 29708, 29709, 29710, 29712, 29717, 29718, 29721 and to amend Sections 29741, 29744 and 29748 of the Government Code, and to amend Section 439.56 of the Agricultural Code and Section 945 of the Military and Veterans Code, all relating to claims against counties.

fect ember 1959

[Approved by Governor July 9, 1959. Filed with Secretary of State July 10, 1959.]

The people of the State of California do enact as follows:

al

SECTION 1. Sections 29700, 29700.1, 29701, 29702, 29703, 29704, 29705, 29707, 29711, 29713, 29714, 29714.1, 29715, 29716, and 29720 of the Government Code are hereby repealed.

SEC. 2. Section 29700 is added to said code, to read:

29700. Except as otherwise provided herein, this chapter applies to all claims for money or damages against counties including claims which are governed by Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of this code. Application

SEC. 3. Section 29706 of said code is renumbered and amended to read:

29701. The board shall not consider a claim unless it is presented not less than three days or, if prescribed by ordinance, five days prior to the date of the meeting of the board at which it is considered. Time of presentment

SEC. 4. Section 29708 of said code is renumbered and amended to read:

29702. A claim based upon an expenditure directed to be made by any officer shall be approved by such officer before it is considered by the board. Approval by officer

SEC. 5. Section 29709 of said code is renumbered and amended to read:

29703. When the board acts upon a claim the clerk of the board shall file a memorandum of the action taken and endorse on the claim a statement thereof. If the claim is allowed in whole or in part, the memorandum and endorsement shall state the date of the allowance, the amount of the allowance, and from what fund allowed and whether the board requires the claimant to accept the amount allowed in settlement of the entire claim. The endorsement shall be attested by the clerk with his signature and countersigned by the chairman and the claim, when duly endorsed, attested and countersigned, shall be transmitted by the clerk to the auditor. Clerk's duties

SEC. 6. Section 29710 is renumbered and amended to read:

29704. If the auditor approves the action taken upon the claim, he shall endorse on the claim "approved" and attest the endorsement with his signature. He shall then issue and tender to the claimant his warrant for the amount allowed. Where the board has required the claimant to accept the amount allowed in settlement of the entire claim, the warrant shall not be delivered to the claimant until there has been delivered to the auditor a duly executed release or other instrument evidencing acceptance of the amount tendered in settlement of the entire claim. Auditor's approval

SEC. 7. Section 29712 of said code is renumbered and amended to read:

29705. The board may adopt forms for the submission and payment of claims and may prescribe and adopt warrant forms separate from claim forms, to the end that the approved claims may be permanently retained in the auditor's office as vouchers supporting the warrants issued. The forms so adopted may not be inconsistent with the provisions of this article or of any other statutes or regulations expressly governing any such claims or the presentation thereof, and shall provide: Adoption of forms

(a) For the approval of the officer directing the expenditure. In counties having a system under which expenditures

APPENDIX D

a school district for the formation of a new district, the county committee shall determine if as to that district the election shall be held only in such territory. For plans and recommendations formed pursuant to Sections 3001 to 3009 for the formation of a new district the county committee shall determine the territory in which the election shall be held. The election shall be held in the district or portion thereof in accordance with such determination.

SEC. 2. Section 1 of this act becomes operative only if Division 5 of the Education Code as proposed to be added by Senate Bill No. 718 of the 1963 Regular Session is enacted by the Legislature at such session, and in such case at the same time as said Division 5 takes effect.

Stats. 1963

CHAPTER 1681

An act to add Division 3.6 (commencing with Section 810) to Title 1 of the Government Code, and to amend Sections 340, 1095 and 1242 of the Code of Civil Procedure, and to repeal Sections 903, 1041, 1042, 13551, 15512, 15513, 15514, 15515 and 15516 of the Education Code, and to repeal Section 1012 of, and Article 6 (commencing with Section 1181) of Chapter 4 of, Division 4 of the Education Code as proposed to be added by Senate Bill No. 718 of the 1963 Regular Session, and to repeal Article 1 (commencing with Section 1950) of Chapter 6 of Division 4 of Title 1 of, Article 6 (commencing with Section 50140) of Chapter 1 of Part 1 of Division 1 of Title 5 of, Article 3 (commencing with Section 53050) of Chapter 1 of Part 1 of Division 2 of Title 5 of, and Sections 2062.5, 39586, 54002, 61627 and 61633 of, the Government Code, and to amend Sections 943 and 954 of, and to repeal Chapter 23 (commencing with Section 5540) of Part 3 of Division 7 of, the Streets and Highways Code, and to repeal Article 10 (consisting of Section 51480) of Chapter 2 of Part 7 of Division 15 of, Chapter 5 (commencing with Section 60200) of Part 3 of Division 18 of, and Sections 22725, 22726, 22730, 22731, 31083, 31089, 31090, 35750, 35751, 35755, 35756, 50150 and 50152 of, the Water Code, and to amend Sections 6005, 6610.3 and 6610.9 of the Welfare and Institutions Code, and to repeal Sections 71754, 71755 and 71756 of the Water Code as added by Chapter 156, Statutes of 1963, and to repeal Section 10 of Chapter 641 of the Statutes of 1931 (Flood Control and Flood Water Conservation District Act), relating to liability of public entities and public officers, servants and employees.

[Approved by Governor July 15, 1963. Filed with Secretary of State July 17, 1963.]

The people of the State of California do enact as follows:

SECTION 1. Division 3.6 (commencing with Section 810) is added to Title 1 of the Government Code, to read:

DIVISION 3.6. CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

PART 1. DEFINITIONS

810. Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.

810.2. "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

810.4. "Employment" includes office or employment.

810.6. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

810.8. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.

811. "Law" includes not only enactments but also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

811.2. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

811.4. "Public employee" means an employee of a public entity.

811.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency.

811.8. "Statute" means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act.

PART 2. LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES

CHAPTER 1. GENERAL PROVISIONS RELATING TO LIABILITY

Article 1. Scope of Part

814. Nothing in this part affects liability based on contract or the right to obtain relief other than money or d
against a public entity or public employee.

814.2. Nothing in this part shall be construed to im
repeal any provision of Division 4 (commencing with

Opinions Attached per Rule 8.1115

Not Reported in F.Supp.2d, 2005 WL 1865419 (N.D.Cal.), 96 A.F.T.R.2d 2005-5953, 2005-2 USTC P 70,244
(Cite as: 2005 WL 1865419 (N.D.Cal.))

H

United States District Court,
N.D. California.
HEWLETT-PACKARD COMPANY, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. C-04-03832 RMW.

Aug. 5, 2005.

Leslie Holmes, Mark Vincent Boennighausen, Jacob J. Miles, Joseph A. Boyle, Kelley Drye & Warren LLP, Thomas R. Hogan, for Plaintiff(s).

David L. Denier, for Defendant(s).

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

WHYTE, J.

[Re Docket Nos. 21, 34]

*1 Plaintiff Hewlett Packard Company ("HP") moves for summary judgment that it is entitled to a refund of federal communications excise taxes in the amount of $6,385,671.86 paid by HP and its predecessor, Compaq Computer Corporation ("Compaq") for taxable quarters ending March 31, 1999 through December 31, 2002. Specifically, it moves for summary judgment that the long distance service purchased by HP and Compaq is not subject to taxation under 26 U.S.C. §§ 4251 and 4252. The United States of America ("IRS") opposes the motion and moves for summary judgment against HP. The court has read the moving and responding papers and considered the arguments of counsel. For the reasons set forth below, the court grants HP's motion for summary judgment.

I. BACKGROUND

Plaintiff HP is a Delaware corporation with its principal place of business in Palo Alto, California. In May 2002, HP acquired Compaq. Brennan Decl. ¶ 3. During the taxable period from January 1, 1999 though December 31, 2002, HP and Compaq purchased telecommunications services pursuant to contracts with AT & T, MCI, and Sprint. In accord with the terms of these contracts, HP and Compaq were charged on a per-minute basis for elapsed transmission time. The charges did not depend on the distance of each communication. Blesi Decl. ¶¶ 3-5; Webb Decl. ¶¶ 2-4. The contracts did not entitle HP and Compaq to make an unlimited number of calls within a specified geographic region for a flat or periodic fee. Blesi Decl. ¶ 6; Webb Decl. ¶ 6.

HP paid federal communications excise taxes of $4,560,280.91 for taxable periods from July 1, 1999 though June 30, 2002. On June 14, 2002, HP filed timely claims for refunds, which were denied. Brennan Decl. ¶¶ 6-7. Compaq paid communications excise taxes of $1,825,390.95 for taxable periods from January 1, 1999 though December 31, 2002. Webb Decl. ¶ 7. On February 25, 2002 and March 14, 2003, Compaq filed timely claims for refunds, which were denied. Brennan Decl. ¶¶ 8-9.

On October 18, 2004, HP filed an amended complaint seeking a refund in the amount of $6,385,671.86 for the total amount of disputed excise taxes paid by HP and Compaq plus statutory interest. The IRS filed a timely answer to the amended complaint denying plaintiff's entitlement to the refund.

II. ANALYSIS

The IRS argues that the telephone services purchased by HP and Compaq during the taxable periods referenced above were subject to an excise tax either as "toll telephone service" in accord with either Internal Revenue Code section 4252(b) or as "local" service in accord with section 4252(a). 26

U.S.C. § 4252. HP argues that the services purchased were not subject to the excise tax because they constituted neither "toll telephone service" nor "local" service within the meaning of the statute. Both parties move for summary judgment.

A. Standards

Summary judgment is proper when there are no genuine issues as to any material fact and the moving party is entitled judgment as a matter of law. *See* Fed R. Civ. P. 56(c). The parties agree that there are no genuine issues of material fact in dispute, and move for summary judgment based on the applicable statutes. Statutory interpretation is a question of law:

> ***2** [S]tatutory ambiguity cannot be determined by referring to the parties' interpretations of the statute. Of course their interpretations differ. That is why they are in court.... Whether a statute is ambiguous is a pure question of law to be determined by the courts, however, not by the parties or by an administrative agency.

John v. United States, 247 F.3d 1032, 1041 (9th Cir.2001) (citations omitted).

B. Statutory Definition of "Toll Telephone Service"

Section 4252(b) defines "toll telephone service" as follows:

> (1) a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States, and
>
> (2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

26 U.S.C. § 4252(b).

HP argues that the long distance services purchased by itself and Compaq are not subject ot the excise tax because they do not constitute "toll telephone service" under either definition: first, because the charges imposed on the services did not vary based on distance, as required by the plain language of section 4252(b)(1), and second, because the services at issue were not flat-rated for unlimited usage as required by section 4252(b)(2).

1. Section 4252(b)(1)

HP argues that within the plain meaning of section 4252(b)(1), the word "and" is unambiguous, therefore charges must vary based on both elapsed time and distance in order to be taxable. *See American Bankers Ins. Group v. United States,* 408 F.3d 1328, 1333 (11th Cir.2005). HP argues that since the charges to HP and Compaq did not vary based on distance, they do not constitute "toll telephone service" within the meaning of the code and are therefore not subject to the excise tax. 26 U.S.C. § 4252(b)(1).

The IRS argues that the word "and" is ambiguous, and may be read disjunctively as a "reference to either or both of two alternatives." *Webster's Third New International Dictionary* 80 (1966). Thus, the IRS argues, "in the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.' " *United States v. Fisk,* 3 Wall. 445, 70 U.S. 445, 447, 18 L.Ed. 243 (1865). The IRS urges the court to follow the reasoning of *Slodov v. United States,* in which the court held that the word "and" could be read either conjunctively or disjunctively with regard to another portion of

the Internal Revenue Code and then rejected the taxpayer's conjunctive reading of "and" as inconsistent with the statute's purpose. 436 U.S. 238, 247, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978).

***3** This court agrees with the numerous other courts that have held the word "and" in section 4252(b)(1) is unambiguously conjunctive.[FN1]

> FN1. *See Office Max, Inc. v. United States,* 309 F.Supp.2d 984 (N.D.Ohio 2004); *Fortis, Inc. v. United States,* 2004 WL 2085528 (S.D.N.Y.2004); *Nat'l RR Passenger Corp. v. United States ("Amtrak"),* 338 F.Supp.2d 22 (D.D.C.2004); *Reese Brothers, Inc. v. United States,* 2004 WL 2901579 (W.D.Pa.2004); *Honeywell Int'l, Inc. v. United States,* 64 Fed. Cl. 188 (2005); *America Online, Inc. v. United States ("AOL"),* 64 Fed. Cl. 571 (2005). In all six cases, the court granted the taxpayer's motion summary judgment, holding that the plain meaning of section 4252(b)(1) is that charges must vary with both distance and elapsed time to be taxable. Plaintiff notes that the *Fortis* court denied summary judgement for the taxpayer based on inbound service. In *American Bankers Ins. Group v. United States,* the district court granted summary judgment in favor of the IRS, 308 F.Supp.2d 1360 (S.D.Fla.2004), but was recently reversed on appeal, 408 F.3d 1328 (11th Cir.2005).

> Unless the context dictates otherwise, the word 'and' is presumed to be used in its ordinary sense, that is, conjunctively. *Crooks v. Harrelson,* 282 U.S. 55, 58, 51 S.Ct. 49, 75 L.Ed. 156 (1930) (construing the tax statute and concluding that 'nothing in the context or in other provisions of the statute warrant the conclusion that the word 'and was used otherwise than in its ordinary sense [, conjunctively]; and to construe the clause [disjunctively,] would be to add a material element ..., and thereby to create, not to expound, a provision of law')].... [T]here is nothing in the statutory context [of section 4252(b)(1)] to suggest that 'and' is used in the provision as meaning 'or.' The phrase is unambiguous. The plain meaning is clear-'and' is used conjunctively.

American Bankers, 408 F.3d at 1332.

The IRS also argues that the word "distance" is ambiguous in the statute and may be synonymous with "toll rate." Opp. at 8-9. However, as plaintiff notes, the IRS later acknowledges that at the time section 4252(b)(1) was enacted, "distance" and conjunctively "elapsed time" were used to calculate the toll charge:

> In 1965, the charge for all long-distance calls, other than WATS calls, was calculated by multiplying a distance toll rate (derived from mileage bands that the call crossed) and the elapsed transmission time of the call.... [V]ariation in distance alone would not necessarily have caused a variation in charge. The variation between charges results from the product of the distance toll rate and the elapsed transmission time as a mathematical function, not from a variation in the distance or in the distance toll rate.

Opp. at 10. Because the IRS acknowledges that distance was a factor used to calculate the "toll rate," it does not follow that "distance" is synonymous with "toll rate."

The IRS argues next that the statute's purpose and legislative history demonstrate the disputed services were a "toll telephone service." Because the statute is unambiguous, the court need not inquire further as to the purpose or intent of Congress: "Where the statutory text is unambiguous the inquiry ends." *American Bankers,* 408 F.3d at 1333 (citing *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004)).

Nevertheless, the court is persuaded that the legislative history supports its present holding. As noted in *American Bankers,* "Congress was seeking to modify and narrow the definition and to phase this

excise tax out entirely by 1969. Congress could have amended the language in 1965 to include broad terms able to adapt to technological changes; instead, Congress specifically defined 'toll telephone service' with an eye toward the tax expiring four years later." 408 F.3d at 1333; *see also Office Max,* 309 F.Supp.2d at 1000 ("The Court must presume that Congress meant what it said when it tailored the definition of taxable 'toll telephone service' to include distance and time requirements, particularly in light of the overall goal of the [1965] Act to reduce and restrict the application of federal excise taxes.").

***4** Next, the IRS argues that Revenue Ruling 79-404, which supports a disjunctive interpretation of the word "and," should be given *Chevron* deference in interpreting section 4252(b)(1). Plaintiff counters that Revenue Ruling 79-404 disregards the plain language of section 4252(b)(1) and therefore is not entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Under *Chevron,* if the congressional intent is clear, the inquiry ends: "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 842-43. Only if the statute is silent or ambiguous, does the court move on to evaluate agency interpretation. *Id.* Since the court has concluded the statute is unambiguous, it need not give deference to Revenue Ruling 79-404, nor determine the proper level of deference. *American Bankers,* 408 F.3d at 1335.

Finally, the IRS argues that even if the telephone services provided were not within the express terms of the statute, Congress should be deemed to have intended it so based on the Reenactment Doctrine. The Reenactment Doctrine states that longstanding IRS and Treasury interpretations of the Code are entitled to great deference when Code provisions they interpret have been re-enacted by Congress. *United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 220, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001).

Plaintiff counters that the Reenactment Doctrine is not applicable because the statutory language at issue is unambiguous. "In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *National Muffler Dealers Ass'n, Inc. v. United States,* 440 U.S. 472, 477, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979). *See also Peoples Federal Sav. and Loan Ass'n of Sidney v. C.I.R.,* 948 F.2d 289, 302 (6th Cir.1991) ("The re-enactment doctrine is merely an interpretive tool fashioned by the courts for their own use in construing ambiguous legislation. It is most useful in situations where there is some indication that Congress noted or considered the regulations in effect at the time of its action.").

The IRS contends that after Revenue Ruling 79-404 was published, Congress extended and then made permanent the provisions of the 1965 Act taxing local and toll telephone service. Opp. at 16-17. Plaintiff contends there is no indication in the legislative history that Congress was aware of Revenue Ruling 79-404 at the time of re-enactment:

> [T]he reenactment doctrine cannot alter the plain meaning of the statute, and, moreover, there is nothing to indicate the Congress adopted, tacitly or otherwise, the interpretation presented in Revenue Ruling 79-404. The Revenue Ruling was limited to the narrow issue of ship-to-shore communications, and there is no evidence that the Ruling was ever cited or applied between 1979 and the latest congressional reenactment in 1998. While the Ruling was issued over twenty years ago, it is not comparable o the longstanding treasury regulations in *Cleveland Indians Baseball* and *College Savings.* Ultimately, there is no indication that Revenue Ruling 79-404 was brought to the attention of Congress or that Congress in any subsequent reenactments considered the

question involved in the Ruling.

***5** *Fortis,* 2004 WL 2085528 at *12. The court also notes that in *Cleveland Indians,* the plain language of the statute and the regulation at issue were not incompatible. *Cleveland Indians Baseball Co.,* 532 U.S. at 220.

The court's conclusion is in accord with the six other courts that have held that the Reenactment Doctrine does not apply to section 4252(b)(1): FN2

> FN2. *Office Max,* 309 F.Supp.2d 984, 1005; *Fortis, Inc.,* 2004 WL 2085528, *11-12; *Reese Brothers, Inc.,* 2004 WL 2901579, *11; *Honeywell Int'l, Inc.,* 2005 WL 375601, *8; *AOL,* 64 Fed.Cl. at 581; and *American Bankers,* 408 F.3d at 1335-36.

> [N]ot only is the statutory language clear under § 4252(b)(1), but there is nothing to indicate that Congress was aware of Revenue Ruling 79-404, 1979-2 C.B. 382 when it subsequently amended and re-enacted this taxing statute. The legislative history reveals no mention of Revenue Ruling 79-404, 1979-2 C.B. 382 nor does the record reveal consideration of the issue raised in the Ruling. *See, e.g., Office Max,* 309 F.Supp.2d at 1004-1005. Thus, there is nothing to indicate Congress was aware of Revenue Ruling 79-404, 1979-2 C.B. 382 when the taxing provisions were re-enacted.

American Bankers, 408 F.3d at 1335-36.

2. Section 4252(b)(2)

The IRS argues in the alternative that the communications service provided to HP and Compaq constitutes "toll telephone service" within the meaning of section 4252(b)(2) because it (1) provides the right to an unlimited number of calls to points in a specified area outside the local telephone system area, and (2) is subject to charge that is both periodic and determined either as a flat amount or upon the basis of total elapsed transmission time.

HP counters that the services did not allow either company to make unlimited calls for a flat amount or periodic charge. Blesi Decl. ¶ 6; Webb Decl. ¶ 6. The services were not billed as a flat rate, but were charged based on the duration of each call. Blesi Decl. ¶ 5; Webb Decl. ¶ 5. Thus, plaintiff argues, the services do not constitute "toll telephone service" by the IRS's own definition:

> Taxpayer argues that it purchases services described in § 4252(b)(2). Taxpayer emphasizes that the charge for each services is based upon total elapsed transmission time as used in the parenthetical in § 4252(b)(2). However, the charges for services are determined on the basis of the duration of each call. Unlike local service, Taxpayer does not pay a fixed amount in advance for an unlimited number of calls. Thus, the Services are similar to the service in Revenue Ruling 79-404 that was held to be described in § 4252(b)(1), not § 4252(b)(2). That is, the Services in question do not entitle Taxpayer to an unlimited number of calls to a specified area for which a charge is made based on flat fee or elapsed transmission time, but rather provide Taxpayer with telephone service for which Taxpayer is charged an amount that varies based upon the duration of each call.

IRS National Office Technical Advice Memorandum 200227008 (March 8, 2001). FN3

> FN3. *See also* Technical Advice Memorandum 199923002 (February 19, 1999); Technical Advice Memorandum 97100003 (November 19, 1996); and Technical Advice Memorandum 2000009005 (November 8, 1999).

There is no dispute, and the service contracts reflect, that HP and Compaq were charged based on the duration of each call. Blesi Decl., Ex. A; Webb Decl., Ex. A. Thus, the services did not constitute "toll telephone service" within the meaning of section 4252(b)(2).

C. Applicability of Section 4252(a) "Local Telephone Service"

***6** The IRS argues that if this court were to conclude that the services are not "toll telephone service," then they are taxable as local telephone service, because the system accessed by HP and Compaq was arguably "local" in that they are not specifically excluded by the statute, which was "obviously designed to be comprehensive." Opp. at 22. Section 4252(a) defines "local telephone service" as follows:

> (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and
>
> (2) any facility or service provided in connection with a service described in paragraph (1).
>
> The term "local telephone service" does not include any service which is a "toll telephone service" or a "private communication service" as defined in subsections (b) and (d).

26 U.S.C. § 4252(a).

Plaintiff counters with two arguments supported by recent court decisions on this matter: (1) " 'The fact that certain exemptions are specified does not mean that anything not expressly exempted is taxed," ' *American Bankers,* 408 F.3d at 1338 (quoting *AOL,* 64 Fed. Cl. at 582-83); and (2) the IRS's interpretation is at odds with the plain meaning of the statute. *Fortis,* 2004 WL 2085528 at *15 ("It is hardly a plain or natural reading of the statute to claim that the entire United States is part of one 'local telephone system." '); *Honeywell,* 64 Fed. Cl. at 203 (same); *Office Max,* 309 F.Supp.2d at 1007 ("[T]here is no basis upon which to find that the long-distance service at issue herein falls within the statutory definition of 'local telephone service." '). "It is inconceivable that Congress considered a nationwide telecommunications network to be 'local.' The text of the statute belies such an interpretation." *Amtrak,* 338 F.Supp.2d at 30.

The court agrees with the reasoning of numerous other courts that the plain language of section 4252(a) does not support the IRS's argument that the nationwide and international service at issue is "local." Therefore, the statute does not apply to the disputed services.

III. ORDER

For the foregoing reasons, the court GRANTS HP's motion for summary judgment of liability against the IRS. The parties shall confer regarding the total amount to which HP is entitled and, if possible, stipulate as to the amount to which HP is entitled. After the damages issue is resolved, the court will enter a final judgment.

Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

N.D.Cal.,2005.
Hewlett-Packard Co. v. U.S.
Not Reported in F.Supp.2d, 2005 WL 1865419 (N.D.Cal.), 96 A.F.T.R.2d 2005-5953, 2005-2 USTC P 70,244

END OF DOCUMENT

Not Reported in F.Supp.2d, 2004 WL 2901579 (W.D.Pa.), 94 A.F.T.R.2d 2004-7229
(Cite as: 2004 WL 2901579 (W.D.Pa.))

H

United States District Court,
W.D. Pennsylvania.
REESE BROTHERS, INC., Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. 03-CV-745.

Nov. 30, 2004.

Stanley M. Stein, Feldstein, Grinberg, Stein & McKee, Pittsburgh, PA, Stephen Rosen, Henry D. Levine, Levine, Blaszak, Block & Boothby, L.L.P., Bradley S. Waterman, Washington, DC, for Plaintiff.

Albert W. Schollaert, Pittsburgh, PA, R. Scott Clarke, Washington, DC, for Defendant.

ORDER

MCVERRY, J.

*1 AND NOW, this *30th* day of *November,* 2004, after the plaintiff, Reese Brothers, Inc., submitted a Motion for Summary Judgment, and after a Motion for Summary Judgment was submitted by defendant, United States of America, and after a Report and Recommendation was filed by the United States Magistrate Judge granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by defendant, and the response to those objections filed by plaintiff, and upon independent review of the motion and the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that plaintiff's Motion for Summary Judgment [Docket No. 7] is granted; and the defendant's Motion for Summary Judgment [Docket No. 14] is denied.

IT IS FURTHER ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

REPORT AND RECOMMENDATION

HAY, Magistrate J.

I. *RECOMMENDATION*

It is respectfully recommended that the motion for summary judgment submitted on behalf of plaintiff (Docket No. 7) be granted; and the motion for summary judgment submitted on behalf of defendant (Docket No. 14) be denied.

II. *REPORT*

Presently before this Court for disposition are cross motions for summary judgment brought by plaintiff, Reese Brothers, Inc. ("Reese") and defendant, the United States of America.

Reese commenced this action under 26 U.S.C. §§ 6532 and 7422, seeking reimbursement of federal excise tax in the amount of $345,351.53, it claims it overpaid to defendant.

According to the record, Reese, a Pennsylvania corporation, purchased intrastate and interstate long distance voice services from LCI International Telecom Corp. ("LCI"), Qwest Communications Corporation ("Qwest") and MCI Telecommunications Corporation ("MCI") from July 1, 1998 through March 31, 2002.[FN1] LCI, Qwest and MCI collected federal excise tax on these various services and remitted them to the Internal Revenue Service ("IRS").[FN2] On November 21, 2001, Reese filed claims with the IRS for a refund of $319,496.33 for the federal excise taxes collected for the services rendered from July 1, 1998 through

June 30, 2001.[FN3] On August 2, 2002, Reese filed claims with the IRS for a refund of $26,048.38 for the federal excise taxes collected for the services rendered from July 1, 2001 through March 31, 2002.[FN4] In both instances, Reese claimed that it was entitled to the refund because it was not charged for the services based on the distance of the telephone calls and, thus, the services were not subject to the federal excise tax. The IRS, it appears, received the refund claims on November 26, 2001, and August 7, 2002, respectively, but has not responded to them.[FN5] Consequently, Reese filed the instant complaint on May 22, 2003, seeking a refund of the taxes paid.

FN1. Plaintiff's Exhibit 1: Affidavit of Ralph Reese ("Reese Aff."), ¶¶ 3-9; Plaintiff's Exhibit 2: LCI Agreement; Plaintiff's Exhibit 3-5, 6: Qwest Agreements and Qwest Pennsylvania Tariff, respectively; Plaintiff's Exhibits 7, 8: MCI Agreement and MCI Pennsylvania Tariff, respectively (Docket No. 7).

FN2. Reese Aff. ¶ 10. *See* Supplemental Reese Aff. ("Suppl. Reese Aff."), ¶¶ 2, 3; Exhibit A to Suppl. Reese Aff.: Copies of Reese's canceled checks remitted to LCI, Qwest and MCI for services (Docket No. 19).

FN3. Plaintiff's Exhibit 9: Reese's Claim for Refund filed on November 21, 2001 (Docket No. 7).

FN4. Plaintiff's Exhibit 10: Reese's Claim for Refund filed on August 2, 2002 (Docket No. 7). In its first amended complaint, Reese reduced the amount of the refund sought for services provided between July 1, 2001 and March 31, 2002, to $25,855.20 thereby reducing the aggregate amount sought to $345,351.53. *See* First Amended Complaint, ¶ 13 (Docket No. 5); Plaintiff's Statement of Undisputed Facts, ¶¶ 17, 21; Defendant's Response and Counter-statement of Undisputed Facts, ¶¶ 17, 21.

FN5. *See* Plaintiff's Statement of Undisputed Facts, ¶¶ 16, 18 (Docket No. 7); Defendant's Response and Counter-statement of Undisputed Facts, ¶¶ 16, 18 (Docket No. 16).

***2** Cross-motions for summary judgment have now been filed in which the parties largely dispute the meaning of the word "and" that appears in the portion of the Internal Revenue Code under which the federal excise tax on toll telephone service is imposed.[FN6]

FN6. We note here that defendant initially argued in its motion that subject matter jurisdiction was wanting because plaintiff had failed to demonstrate that it had actually paid the excise tax at issue. Apparently satisfied by the copies of cancelled checks submitted by plaintiff in conjunction with its responsive brief (Docket No. 19), defendant now concedes that jurisdiction lies with the Court. *See* Docket No. 23. Consequently, we have not addressed the issue.

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P. 56(c). *See Marzano v. Computer Science Corp.*, 91 F.3d 497, 501 (3d Cir.1996). In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non-moving party. *Id.*, citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence the meritorious nature of the claim. *Orsatti v. New Jersey*, 71 F.3d 480, 484 (3d Cir.1995).

Section 4251 of the Internal Revenue Code ("the Code"), imposes a three percent tax on amounts

paid for "communications services," which includes "toll telephone service." 26 U.S.C. §§ 4251(a)(1), (b)(1), (b)(2).[FN7] The Code further defines "toll telephone service" as:

> FN7. Although the person paying for the telephone service is responsible for the tax imposed, the service provider is required to collect the tax from its customers and remit it to the government. *Office Max, Inc. v. United States,* 309 F.Supp.2d 984, 988 n. 5 (N.D.Ohio 2004). *See* 26 U.S.C. § 4251(a)(2).

> (1) a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States, and
>
> (2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

26 U.S.C. § 4252(b).

This version of § 4252 was adopted in 1965,[FN8] and appears to reflect an effort by Congress to conform the definition of "toll telephone service" to the long distance pricing methods used by AT & T which held a monopoly on long distance service at the time.[FN9] AT & T offered either Message Telephone Service ("MTS"), where subscribers were charged based on tolls which were calculated according to the elapsed time of each telephone call and the mileage band that corresponded to the actual distance of the call, or Wide Area Telephone Service ("WATS"), where subscribers were charged a flat fee for unlimited calls or calls up to a certain hourly limit.[FN10]

> FN8. *See* Excise Tax Reduction Act of 1965, Pub.L. 89-44, § 302, 79 Stat. 136, 146.
>
> FN9. Defendant's Exhibit 2: Declaration of Alan Pearce ("Pearce Decl."), ¶¶ 23, 25 (Docket No. 14).
>
> FN10. Pearce Decl. ¶¶ 17, 24.

Since then, however, largely because AT & T no longer has a monopoly and wireless service has been introduced, the billing methods for long distance services have changed. Indeed, AT & T and other long distance carriers have abandoned the mileage bands and have aggregated them into one band that covers the entire continental United States.[FN11] Thus, it appears that charges for interstate long distance services no longer vary by the distance of the call.[FN12]

> FN11. Pearce Decl. ¶¶ 29, 35.
>
> FN12. Defendant's Exhibit 1: Declaration of Paul B. Vasington ("Vasington Decl."), ¶ 16 (Docket No. 14).

***3** Plaintiff contends that because the toll rates for long distance services are no longer dependent on mileage bands and because § 4252(b)(1) plainly imposes the tax on long distance services only where the charges are based on both the distance of the call *and* the elapsed transmission time of a call, the services provided to it are not subject to the tax.

Defendant, on the other hand, argues that the nature of the word "and" in this particular context renders the statute ambiguous thereby requiring the Court to look beyond the statute to decipher its meaning. Defendant contends that the legislative history as well as an IRS revenue ruling which interprets § 4252(b)(1) indicate that Congress intended for all long distance calls to be taxed and that, to give effect to that intent, the word "and" as used in

4252(b)(1) is properly construed as "or."

We note at the outset that this precise controversy has recently been decided by four other district courts. Two of the four have rendered published opinions in which they, interestingly, have reached different results. *Compare American Bankers Ins. Group, Inc. v. United States,* 308 F.Supp.2d 1360 (S.D.Fla.2004) (*"ABIG"*) (Finding, based on the purpose of §§ 4251 and 4252, that long distance service was taxable even though charges were based on time and not distance), *with OfficeMax v. United States,* 309 F.Supp.2d 984 (N.D.Ohio 2004) (*"OfficeMax"*) (Finding that, under plain meaning of § 4252(b)(1), charges had to vary with both distance and elapsed time to be taxable). The two unpublished cases agreed with the *OfficeMax* Court finding that the plain meaning of the statute dictates that the long distance services at issue are not subject to the tax because they did not, as required under the statute, vary with both distance and elapsed transmission time. *See Fortis, Inc. v. United States,* 2004 WL 2085528 (S.D.N.Y. September 16, 2004); *National Railroad Passenger Corp.,* 2004 WL 2098849 (D.D.C. September 20, 2004).

The positions taken by the parties in the instant case are largely similar to those proffered by the parties in *ABIG* and *OfficeMax.* For the following reasons, we agree with the reasoning of the Court in *OfficeMax.*

In interpreting a statute, the role of the Courts is to give effect to Congress's intent. *Rosenberg v. XM Ventures,* 274 F.3d 137, 141 (3d Cir.2001). "Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute." *Id.* If the statutory language is clear and unambiguous, no further inquiry is necessary. Where an ambiguity exists, however, the Court may look beyond the statute to the legislative history to determine congressional intent. *Ross v. Hotel Employees and Restaurant Employees Intern. Union,* 266 F.3d 236, 245 (3d Cir.2001), *cert. denied,* 534 U.S. 1162, 122 S.Ct. 1172, 152 L.Ed.2d 116 (2002).

***4** Determining whether the language of a statute is ambiguous in the first instance requires the Court to examine "the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *In re Price,* 370 F.3d 362, 369 (3d Cir.2004), quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). As recently found by the Court of Appeals for the Third Circuit, however,

> ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a statute contains an obvious scrivener's error. *Lamie v. United States Trustee,* 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Nor does it arise if the ostensible plain meaning renders another provision of the Code superfluous. *Id.* at 1031. Rather, a provision is ambiguous when, despite a studied examination of the statutory context, the natural reading of a provision remains elusive.

In re Price, 370 F.3d at 369.

Although it cannot be disputed that in certain contexts "and" is sometimes used in the disjunctive, its ordinary meaning has a conjunctive connotation. *United States v. Sherman,* 150 F.3d 306, 316 (3d Cir.1998) (" 'and' is conjunctive."). *See Crooks v. Harrelson,* 282 U.S. 55, 58, 51 S.Ct. 49, 75 L.Ed. 156 (1930); *Bruce v. First Federal Savings and Loan Association of Conroe, Inc.,* 837 F.2d 712, 715 (5th Cir.1988). *See also ABIG,* 308 F.Supp.2d at 1365, quoting *United States v. Brennick,* 908 F.Supp. 1004, 1015 (D.Mass.1995) ("Ordinary use of the term "or" in a statute signifies a disjunctive requirement, while "and" signifies a conjunctive one.") Thus, unless reading "and" in the conjunctive would render § 4252(b)(1) meaningless or defy common sense, the statute should not be found ambiguous. *In re Price,* 370 F.3d at 369; *ABIG,* 308 F.Supp.2d at 1365 (Finding that the plain meaning

of a statute should be given effect unless that interpretation defies common sense.)

Here, in our view, reading § 4252(b)(1) as requiring that the toll charge vary in amount with both the distance and the time elapsed is neither unclear nor defies common sense. Indeed, as found by the Court in *OfficeMax,* both time and distance were, in fact, factors in determining charges for telephone service in 1965 when the amendment under scrutiny was enacted. *OfficeMax,* 309 F.Supp.2d at 933 n. 12, 995. It therefore appears logical to conclude that Congress intended the word "and" to be read conjunctively thereby reflecting the manner in which calls were billed at the time. *Id.* The fact that billing methods have changed and long distance calls are no longer charged based on distance does not alter Congress's intent in 1965 when it amended the statute. *Id.*

Further, as the *OfficeMax* Court opined, if "and" were read in the disjunctive, as defendant would have us do, a call would still fall under the definition of "toll telephone service" even when there is no variation in distance or in the distance toll rate applied. *OfficeMax,* 309 F.Supp.2d at 993-94. Such a reading, however, would effectively eliminate the distance requirement from the statute and render Congress's reference thereto superfluous. *Id.* Because courts "should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous" it does not appear that "and" is properly read as "or" under these particular circumstances. *Rosenberg v. XM Ventures,* 274 F.3d at 142.

***5** Although defendant has cited a number of cases for the proposition that "and" can mean "or," it has not been disputed that in certain contexts "and" is properly interpreted as such in order to effectuate congressional intent. The fact that Congress may have intended "and" to mean "or" in other statutes or even other provisions of this statute, however, does not compel a different result here.[FN13]

FN13. Indeed, "communications services" is defined in § 4251(b)(1) as local telephone service, toll telephone service, *and* teletypewriter exchange service. "And" also joins §§ 4252(a)(1) and (a)(2) as well as §§ 4252(b)(1) and (b)(2). In all three instances, it appears clear that "and" is meant to be read either cumulatively or in the disjunctive. That fact, however, does not require "and" to be read disjunctively everywhere it is used in the statute. *See Brown v. Garner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("Ambiguity is not a creature of definitional possibilities but of statutory context.") If that were the case, under § 4252(b)(1), taxable "toll telephone service" would be those services that are charged based on distance or elapsed time or where the charge is paid within the United States. Such an interpretation would appear to encompass all telephone communications and there would be little need for the rest of the statute. As such, each provision of the statute should be read in its own context. *See In re Price,* 370 F.3d at 1031; *Rosenberg v. XM Ventures,* 274 F.3d at 142.

Moreover, in *Slodov v. United States,* 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978) (*"Slodov"*), upon which defendant principally relies, the statute at issue was 26 U.S.C. § 6672 which imposes personal liability on "any person required to collect, truthfully account for, and pay over any tax imposed by this title." *Id.* at 245. The petitioner argued that he could not be held liable unless he was responsible for all three duties since the provision was phrased in the conjunctive. The Court disagreed finding not only that petitioner's position was at odds with the statute's purpose to assure payment of withheld taxes, but that Congress, albeit inartfully, was trying to clarify the type of tax to which the penalty would apply (*i.e.,* those taxes which the employer was required to collect from third party employees and turned over to the Treas-

ury, as opposed to those taxes paid directly to the Treasury) and was not describing the individual to whom the penalty would apply. *Id.* at 248-250. Otherwise, the Court concluded, a person charged with collecting the taxes but who willfully failed to do so could escape liability by simply by resigning his position prior to the quarter's end. *Id.*

Here, unlike in *Slodov,* Congress's use of the word "and" in its ordinary sense accomplished the desired result of taxing long distance service according to AT & T's billing practices at the time. Thus, there is no basis upon which to find that Congress intended the word to have a different connotation than the ordinary or literal meaning, as was the case in *Slodov.*

Similarly, in *Peacock v. Lubbock Compress Co.,* 252 F.2d 892 (5th Cir.), *cert. denied,* 356 U.S. 973, 78 S.Ct. 1136, 2 L.Ed.2d 1147 (1958), at issue was whether an employer was required to pay overtime wages or whether it was exempt under 29 U.S.C. § 207(a), which created an exception for employers "engaged in the ginning and compressing of cotton." Because the defendant-company was not engaged in the business of ginning cotton but only compressed it, plaintiff-employees brought suit seeking overtime wages. The Court, however, found that Congress did not intend for "and" in this context to be read in the conjunctive since at the time the statute was amended ginning cotton and compressing cotton were two separate operations that were "never carried on together." *Id.* at 893. Thus, reading "and" in its ordinary meaning would effectively eliminate all cotton production from the exemption which Congress could have accomplished by not referencing it at all. *Id.* at 894. Because, however, Congress intended to exempt all agriculture employers from paying overtime wages, the Court held that "and" should not be read literally and that the performance of either ginning or compressing cotton was exempt under the statute. *Id.* at 895.

***6** Unlike in *Peacock,* reading § 4252(b)(1)'s "and" in the conjunctive does not appear to run counter to the statute's purpose as long distance telephone service was in fact charged based on both distance and elapsed transmission time when § 4252(b)(1) was last modified. Thus, reading "and" in its ordinary meaning appears to give effect to Congress's intent at the time and there is no reason to depart from its literal meaning.

Defendant also contends that, notwithstanding whether "and" in the particular context is ambiguous, there are other ambiguities in the statute which require the Court to resort to the legislative history.

Whether or not another provision in the statute is ambiguous, however, is not at issue here. Nevertheless, we disagree with defendant's assessments. First, defendant reads § 4252(b)(1) was requiring that a single toll charge for a single phone call vary in amount, and argues that such a reading is "meaningless" because a single number cannot vary with itself.[FN14] The obvious meaning of the provision, however, particularly when read in conjunction with § 4252(b)(2), is that where the charge for each call is assessed on an individual basis and the charges vary in amount from call to call depending on the distance and time elapsed, the service is covered under the provision. This distinguishes § 4252(b)(1) from the services described in § 4252(b)(2) which are not charged on a per-call basis but rather are assessed at a flat rate or based on the total elapsed transmission time for calls made during a billing period.

> FN14. Defendant's Brief, p. 12 (Docket No. 15).

Similarly, although defendant also makes much of the fact that toll charges cannot be calculated from distance and time alone and that any variance would have to be in dollars and cents, it explains elsewhere in its brief that in 1965 charges were calculated by multiplying the elapsed time by a per-minute toll rate which was determined by matching the distance of a call with one of eleven mileage bands.[FN15] Thus, it would appear that a charge that varies with distance necessarily does so be-

cause the rate for that call varies by distance.[FN16]

FN15. Defendant's Brief at p. 5-6.

FN16. *See* Pearce Decl. ¶ 17.

Finally, defendant asserts that the statute is beyond plain meaning because Congress has included under the definition of "toll telephone service," WATS calls for which there is no "toll charge" for individual calls.[FN17] The fact that there is no toll charge for individual calls under the WATS, however, does not negate the fact that § 4252(b)(2) describes a service where a charge is made for an unlimited number of calls or for a fixed number of hours to or from persons outside the local telephone system area. Indeed, defendant also allows that by adding § 4252(b)(2) to the statute in 1965 as a separate and alternative description of "toll telephone service," Congress intended to bring all long distance telephone calls (other than calls made using private communications services) as they were then billed within the scope of the tax.[FN18] Under these circumstances, we are at a loss to see an ambiguity or the confusion that defendant would have us find.

FN17. *See* § 4252(b)(2); H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. at 1677.

FN18. Defendant's Brief at pp. 17-18, 20, 21.

***7** Thus, in our view, it is clear from the plain language of the statute that Congress intended to impose the tax on calls charged based on both distance and duration and that the Court need not resort to legislative history or other interpretive aids to ascertain that intent.

Defendant nevertheless argues that even if the language of § 4252(b)(1) is plain, its plain meaning cannot be invoked where it would lead to absurd results or results that are at odds with congressional intent. Defendant reiterates that it was Congress's intent to tax all individually charged long distance telephone calls under § 4252(b)(1) and that by defining "toll telephone service" as a communication for which the charge varies in amount with the distance and elapsed transmission time, Congress was merely identifying the manner in which AT & T billed for its services. Defendant contends that reading "and" in the conjunctive would run counter to Congress's intent since virtually all long distance calls would be exempt from the excise tax as they are no longer charged according to mileage bands.

It cannot be disputed that where the reading of a statute would produce an absurd result or one that is clearly contrary to legislative intent, courts may look past the plain language. *Lamie v. United States Trustee,* 540 U.S. 526, ----, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004); *Mitchell v. Horn,* 318 F.3d 523, 535 (3d Cir.2003). It does not appear, however, that this case falls into either category and, thus, we decline to attach another meaning to the statute other than that which appears on its face.

First, by arguing that Congress intended to reflect the fact that AT & T charged for long distance calls according to distance and time elapsed, defendant appears to concede that distance was a factor in determining the charge and that Congress intended to include it as such when it enacted the 1965 Amendments. Indeed, the fact that Congress intended to include distance as a factor in imposing the tax is only exemplified by the fact that Congress modified the previous definition under which all long distance call would have been taxed to one which is significantly more narrow.[FN19]

FN19. Prior to the 1965 Amendments, "toll telephone service" was defined simply as "a telephone or radio message for which (1) there is a toll charge, and (2) the charge is paid within the United States." Excise Tax Technical Changes Act of 1958, Pub.L. 85-859, § 133(a), 72 Stat. 1285, 1290.

Moreover, Congress's 1965 Amendments included provisions to eliminate the tax altogether by 1969.[FN20] It therefore does not appear absurd that

Congress would have intended to narrow the scope of taxable long distance calls when it enacted the 1965 Amendments. The fact that billing methods have changed and calls are no longer charged using mileage bands does not negate the fact that Congress intended distance to be factor in 1965 or provide the basis for disregarding the statute's plain meaning. To the contrary, in our view, it simply means the statute is outdated. Indeed, as succinctly put by the District Court for the Southern District of New York in addressing this issue:

> FN20. H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1676; S.Rep. No. 89-324, 1965 U.S.C.C.A.N.1960, 1724-25. *See Trans-Lux Corp. v. United States,* 696 F.2d 963, 966 (Fed.Cir.1982); *OfficeMax,* 309 F.Supp.2d at 999.

> [u]pdating the statute is not the Court's role, particularly when doing so would require reading the term "distance" out of the statute. As the Supreme Court has instructed, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Lamie v. United States Tr.,* 540 U.S. 526, 124 S.Ct. 1023, 1032, 157 L.Ed.2d 1024 (2004) (internal quotation omitted). The Laime Court, in the face of an alleged drafting error by Congress, maintained that it was "unwilling[ ] to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome," *id.,* and that if the statute needs to be amended, that task should be left to Congress. *See id.* at 1034. This case does not even involve a drafting error; it involves a disconnect between a forty-year-old tax scheme and recent innovations in the telecommunications industry. It is plainly Congress's responsibility to decide whether to revise the statute to accommodate such developments.

***8** *Fortis, Inc. v. United States,* 2004 WL 2085528 *9 (S.D.N.Y. September 15, 2004).

Moreover, even if the Court were to look beyond the words of the statute to determine Congress's intent, it does not appear that either the legislative history or the revenue ruling relied upon by defendant compels a different result.

Defendant urges the Court to adopt the *ABIG* Court's finding that Congress's purpose in adopting the 1965 amendments was to preserve the statute's revenue raising propensities and expand its scope by collecting tax on all commercial long distance service. *See ABIG,* 308 F.Supp.2d at 1367-68.

Review of the reports accompanying the legislation, however, indicate that the changes enacted by Congress in 1965 were designed to 1) lower the rate for communication services from ten to three percent with subsequent one percent reductions each year until the tax was phased out completely; [FN21] 2) create an exemption for private communication services; [FN22] 3) repeal the excise tax on telegraph service and wire and equipment service; [FN23] and, most relevant to the instant controversy, 4) update and modify the definitions of local telephone service, toll telephone service, and teletypewriter exchange service.[FN24]

> FN21. H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1676; S.Rep. No. 89-324, 1965 U.S.C.C.A.N.1960, 1724-25. *See Trans-Lux Corp. v. United States,* 696 F.2d 963, 966 (Fed.Cir.1982); *OfficeMax,* 309 F.Supp.2d at 999.

> FN22. H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1677; S.Rep. No. 89-324, 1965 U.S.C.C.A.N.1960, 1726. *See Trans-Lux Corp. v. United States,* 696 F.2d at 967; *OfficeMax,* 309 F.Supp.2d at 999.

> FN23. H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1678; S.Rep. No. 89-324, 1965 U.S.C.C.A.N.1960, 1727. *See OfficeMax,* 309 F.Supp.2d at 999.

FN24. H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1676-77; S.Rep. No. 89-324, 1965 U.S.C.C.A.N.1960, 1725. *See Trans-Lux Corp. v. United States,* 696 F.2d at 967; *OfficeMax,* 309 F.Supp.2d at 999.

As previously stated, prior to the 1965 amendments, "toll telephone service" was defined simply as "a telephone or radio telephone message or conversation for which (1) there is a toll charge, and (2) the charge is paid within the United States." Excise Tax Technical Changes Act of 1958, P.L. 85-859, § 133, 72 Stat. at 1290. The definition adopted in 1965 clearly departed from this broad definition with the only explanation in the legislative history being:

> The definitions of local telephone service (previously general telephone service), toll telephone service, and teletypewriter exchange service have been updated and modified to make it clear that it is the service as such which is being taxed and not merely the equipment being supplied.
>
> Toll telephone service is defined as being a telephonic quality communication for which a toll charge is made which varies in amount with the distance and elapsed transmission time of individual communications, but only if the charge is paid within the United States.

H.R.Rep. No. 89-433, 1965 U.S.C.C.A.N. 1645, 1676-1677; S.Rep. No. 89-324, 1965 U.S.C.C.A.N. 1690, 1725.

Notwithstanding the more tailored definition of "toll telephone service" and the fact that the legislative history demonstrates that it was Congress's intent to define "toll telephone service" as "a telephonic quality communication for which a toll charge is made which varies in amount with the distance and elapsed transmission time," defendant maintains that the legislative history shows that Congress was merely clarifying the fact that only services, as opposed to equipment, were to be taxed and that it did not alter the type of services to be taxed other than to exclude private long distance communications and include WATS. Defendant argues that because of AT & T's monopoly, Congress's addition of "distance and elapsed transmission time" did not alter the fact that virtually all long distance calls were taxed but was merely an effort to define "toll telephone service" in a manner consistent with AT & T's pricing scheme.

***9** Nowhere in the legislative record, however, does it state that Congress intended to tax all long distance services. As argued by plaintiff, if that is what Congress intended, it could have simply said so. Instead, it took a broad definition, under which virtually all long distance calls-including plaintiff's-would have been taxed and replaced it with a narrow definition requiring that the charges associated with such calls vary with time and distance.[FN25] Coupled with the fact that the overall goal at the time was to reduce the application of federal excise taxes so as to eliminate them completely by 1969, it is not unreasonable to find that Congress intended to tax toll telephone services as it so defined.[FN26] *See Trans-Lux Corp. v. United States,* 696 F.2d at 966; *OfficeMax,* 309 F.Supp.2d at 999.

FN25. Under these circumstances, it is difficult to accept defendant's argument that there is no indication that Congress meant to narrow its definition of toll services other than to distinguish between equipment and services. To the contrary, the modification itself is very persuasive evidence that Congress intended to narrow the definition.

FN26. Notably, the 1965 legislation is entitled the "Excise Tax Reduction Act of 1965." *See ABIG,* 308 F.Supp.2d at 1367. Moreover, the fact that the expiration schedule was subsequently extended and ultimately abandoned does not alter Congress's intent in 1965. *See* Vasington Decl.

¶¶ 12, 13.

Defendant also relies on IRS Revenue Ruling 79-404 in which the IRS interpreted § 4252(b)(1) as imposing the excise tax on all long distance calls, including those that were charged without regard to distance, finding that the 1965 amendment in which "toll telephone service" was redefined merely reflected AT & T's billing methods at the time and that to eliminate non-distance sensitive calls from the excise tax would frustrate congressional intent.[FN27] Defendant argues that the Revenue Ruling is entitled to substantial deference because it is a reasonable interpretation invoked by the agency charged with implementing the statute.

> FN27. Revenue Ruling 79-404, submitted by plaintiff as Exhibit 12 (Docket No. 7), concerned communications between ships or other off shore facilities and telephone subscribers in the United States for which the charges for the service varied only with the duration of each call.

The difficulty with defendant's argument, however, is two fold. First, the IRS conceded in the Revenue Ruling that its interpretation was contrary to the literal language of the statute since § 4252(b)(1) required that charges vary with both distance and time. Second, it does not appear that it deserves the "substantial deference" that defendant would have the Court grant merely because it was issued by the IRS.

As recently found by the Court of Appeals for the Third Circuit, "[w]e owe no deference to an agency interpretation plainly inconsistent with the relevant statute." *Mercy Catholic Medical Center v. Thompson,* 380 F.3d 142, 152 (3d Cir.2004). Moreover, an agency interpretation is entitled to substantial deference only where Congress generally delegated authority to the agency to make rules carrying the force of law and the interpretation was, in fact, promulgated in the exercise of that authority. *Id. See United States v. Mead Corp.,* 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Indeed, as further found by the Court in *Mercy Catholic,* interpretive guidelines and other informal interpretations such as agency statements contained in opinion letters, policy statements, agency manuals, and enforcement guidelines are distinguishable from promulgated regulations because they lack the force of law and, thus, do not warrant substantial deference. *Id.* To hold otherwise, the Court held, "would unduly validate the results of an informal process." *Id.* at 155, quoting *Madison v. Resources for Human Development, Inc.,* 233 F.3d 175, 186 (3d Cir.2000). Finding, however, that an agency's informal interpretation can offer some guidance, the Court held that the weight that should be afforded such an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control ." *Id. See United States v. Mead Corp.,* 533 U.S. at 226-27 (Deference is appropriate only when Congress delegated authority to the agency to make rules carrying the force of law and where the agency interpretation was promulgated in the exercise of that authority through notice-and-comment rule making.); *C.I.R. v. Schleier,* 515 U.S. 323, 336 n. 8, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995) (Noting that an IRS's revenue ruling does not have the force and effect of regulations and could not be used to overturn the plain language of a statute.)[FN28]

> FN28. In this manner, *Connecticut General Life Insurance Co. v. Commissioner of Internal Revenue,* 177 F.3d 136 (3d Cir.), *cert. denied,* 528 U.S. 1003, 120 S.Ct. 496, 145 L.Ed.2d 383 (1999), to which defendant cites for the proposition that Revenue Ruling 79-404 is entitled to substantial deference is distinguishable. At issue in that case was the deference to be afforded a federal *regulation* which Congress gave the Secretary of the Treasury authority to promulgate and, thus, carried the force of law. *Id.* at 143.

***10** Here, as already discussed, in our view the IRS's interpretation is plainly inconsistent with the plain language of the statute-a point which the IRS concedes in the Revenue Ruling. Moreover, as argued by plaintiff and as found by several courts, the cases upon which the IRS relied in the Revenue Ruling for the proposition that a Court may look beyond the plain meaning of a statute when the plain meaning would produce absurd or unreasonable results, appear to render the level of the IRS's consideration and the validity of its reasoning suspect.

In one such case, *United States v. American Trucking Association,* 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940) (*"American Trucking"*), the meaning of the word "employees" as used in section 204 of the Motor Carrier Act was at issue. Finding the term, which was otherwise undefined, ambiguous the Court looked to the history and purpose of the statute. Relying on the legislative history, the Court ultimately interpreted the term narrowly as being "limited to those employees whose activities affect the safety of operation" thereby limiting the jurisdiction of the Interstate Commerce Commission. *Id.* at 544. In so holding, the Court found that it was permissible for courts to interpret an ambiguous term according to the statute's purpose if the literal language would produce unreasonable results that were at odds with the policy of the legislation as a whole. *Id.*

Here, unlike in *American Trucking,* not only is the term at issue-"toll telephone service"-defined under the statute, but Congress expressly modified the definition to cover calls for which the charge varies with time and distance. Further, as already discussed, "and" does not appear to be ambiguous and reading the statute according to its plain meaning is not, contrary to defendant's position, absurd or unreasonable as charging did vary with distance and time when the 1965 amendments were enacted. Thus, resorting to the legislative history or evidence of the statute's purpose is not necessary here as it was in *American Trucking.*

Further, to the extent that the IRS consulted the legislative history when it issued Revenue Ruling 79-404, it found only that "[t]here is no indication that Congress otherwise intended to make changes in the type of service subject to the tax." [FN29] That finding, however, is belied by the fact that Congress expressly modified the broad definition of "toll telephone service," *i.e.,* calls for which "there is a toll charge," to a narrow one defining it as a telecommunication for which the charge varied with distance and time. Moreover, having resorted to the legislative history, the IRS's finding that there was a lack of evidence regarding congressional intent does not appear sufficient to interpret the statute in a manner contrary to its plain meaning. Thus, it appears that the IRS's reliance on *American Trucking* and the statute's legislative history when it issued Revenue Ruling 79-404 was not well reasoned and, thus, it appears that the ruling should be given little, if any, deference.

FN29. Revenue Ruling 79-404, p. 3.

***11** In addition, the IRS's reliance on *Corn Products Refining Co. v. Commissioner,* 350 U.S. 46, 76 S.Ct. 20, 100 L.Ed. 29 (1955) (*"Corn Products"*), appears to be similarly misplaced as the Supreme Court significantly narrowed the holding of that case in *Arkansas Best Corp. v. Commissioner of Internal Revenue,* 485 U.S. 212, 108 S.Ct. 971, 99 L.Ed.2d 183 (1988) (*"Arkansas Best"*). In *Corn Products,* the Court found that corn futures owned by a corn syrup refiner were not "capital assets" under § 1221 of the Internal Revenue Code even though they did not come within the literal language of the section's exclusions. Finding that "Congress intended that profits and losses arising from the everyday operation of a business can be considered as ordinary income or loss rather than capital gain or loss," the Court declined to read the capital-asset provision so broadly so as to defeat that intent. *Id.* at 52.

Subsequently, in *Arkansas Best,* the petitioner, relying on *Corn Products,* argued that despite the fact that the stock at issue fell under § 1221's literal

definition of capital assets, the "assets acquired and sold for ordinary business purposes rather than for investment purposes should be given ordinary-asset treatment." *Arkansas Best,* 485 U.S. at 216. The Court, however, disagreed with the petitioner finding that *Corn Products* merely stood for the proposition that § 1221's exclusions should be read broadly and that the "hedging" transactions at issue therefore fell within the inventory exclusion. *Id.* at 220, 222. Thus, while *Corn Products,* may have found that the statutory provision at issue should not be read so broadly as to defeat Congress's purpose, the Supreme Court subsequently narrowed that holding finding, instead, that the case merely held that the transaction at issue fell within one of the statutory exclusions. *Id.* at 222. Under these circumstances, like with *American Trucking,* it does not appear that the IRS reliance on *Corn Products* was well reasoned and the level of its persuasiveness is such that it should be afforded little deference.

Defendant nevertheless argues that because Congress has reenacted § 4252(b)(1) since Revenue Ruling 79-404 was issued, it necessarily has approved of and concurred with the IRS's interpretation and, thus, the ruling should be given deference on this basis as well.

"Generally speaking, the doctrine of legislative reenactment assumes that when Congress reenacts legislation, it incorporates existing administrative and judicial interpretations of the statute into its reenactment." *Dutton v. Wolpoff and Abramson,* 5 F.3d 649, 655 (3d Cir.1993). Where, however, the statutory language is unambiguous and the regulation is at odds with it, the reenactment doctrine does not apply. *Id. See Brown v. Gardner,* 513 U.S. 115, 121, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). Moreover, where there is no evidence that Congress was aware of the agency's interpretation in the first instance, the reenactment is without significance and is not entitled to deference. *Id.* at 121-123.

***12** In the instant case, not only does it appear that the language of § 4252(b)(1) is unambiguous but, as conceded by the IRS in the Revenue Ruling, it is at odds with the plain language of § 4252(b)(1). Further, there is no evidence that Congress was aware of Revenue Ruling 79-404 when § 4252(b)(1) was reenacted. Indeed, unlike a regulatory interpretation from which it can seemingly be presumed that Congress was aware of its existence since it was promulgated at Congress's behest, a revenue ruling such as 79-404 does not carry with it that same presumption. In fact, in both of the cases relied upon by defendant for the proposition that the reenactment doctrine applies in this case, a treasury regulation promulgated under Congress's grant of authority was at issue and not an informal ruling as is at issue here. *See United States v. Cleveland Indians Baseball Co.,* 532 U.S. 200, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001); *Cottage Savings Association v. Commissioner of Internal Revenue,* 499 U.S. 554 (1991).[FN30] Under these circumstances, the fact that Congress continued to reenact § 4252(b)(1) after the IRS issued Revenue Ruling 79-404 appears to be of little significance and does not provide the basis for deferring to the ruling. *See National Muffler Dealers Association, Inc. v. United States,* 440 U.S. 472, 476-77, 99 S.Ct. 1304, 59 L.Ed.2d 519 (1979) (emphasis added) (Finding that the Court customarily defers to *regulations* because Congress has delegated to the Secretary of the Treasury and the Commissioner of the IRS the task of proscribing rules and regulations for the enforcement of the Internal Revenue Code.); *Madison v. Resources for Human Development, Inc.,* 233 F.3d at 186 (Drawing the distinction between an agency's interpretive guideline and an official regulation "promulgated after notice-and-comment rule making.")

> FN30. Moreover, the Court in *Cottage Savings* also found that the treasury regulation at issue was consistent with landmark precedents on the issue which were decided around the time of the statute's initial enactment, unlike in the instant case, where the revenue ruling is contrary to the statute's plain language and is based on

> precedent that is, in our view, clearly suspect. *See Cottage Savings Association,* 499 U.S. at 561.

Alternatively, defendant argues that even if § 4252(b)(1) requires charges to be assessed on the basis of both time and distance, plaintiff's telephone service would still be subject to the excise tax because the various contracts plaintiff entered into for long distant services imposed different rates on international, domestic interstate and domestic intrastate calls and that the rates for these calls were selected on the basis of distance.

This precise argument was made by the Government in *OfficeMax* and was rejected by the Court. Instead, the Court agreed with the plaintiff who argued, much as the instant plaintiff has, that differentiating between interstate, intrastate and international calls is solely for the purpose of allocating regulatory responsibility between the FCC and state regulators as set forth in the Communications Act of 1934 and that, although rates may differ between the jurisdictional classification, that is a result of the classification itself and the corresponding rate structures imposed by the relevant regulatory agency and not because of the distance of the call.[FN31] *OfficeMax,* 309 F.Supp.2d at 995-96. Thus, different states may have different per-minute rates for intrastate calls that are unrelated to the distance the call travels just as intrastate and interstate rates could be the same for calls that travel different distances. *Id.* Further, in certain instances, an intrastate call could travel a longer distance that an interstate call. *See Fortis, Inc. v. United States,* 2004 WL 2085528 at *13.

> FN31. It appears undisputed that the Communications Act of 1934 establishes a dual system for regulating telephone service whereby the FCC regulates interstate and international communications and state agencies control intrastate service. *See Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355, 360, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). *See also* Pearce Decl. ¶ 26.

***13** Indeed, as pointed out by plaintiff, under the LCI contract in effect from July through December 1998, the charge for an interstate call from Pittsburgh to Los Angeles-a distance of approximately 2400 miles-is 5.1 cents per minute while the charge for an intrastate call from Pittsburgh to Philadelphia, a distance of only 300 miles, is 7.1 cents per minute.[FN32] Under these circumstances, it does not appear that the distinctions between intrastate and interstate calls necessarily correspond to the distance the call travels but rather on the political jurisdiction in which the call originates and terminates.

> FN32. Plaintiff's Exhibit 2: LCI Agreement, p. 4.

Further, although defendant argues that plaintiff's answer to Interrogatory 2D leaves no doubt that MCI charged plaintiff a long distance rate based on distance and time, a review of plaintiff's interrogatory answer and relevant documents shows otherwise. Asked to describe its understanding of how the service charges were computed plaintiff responded,

> MCI first applied the distance-sensitive rates for Interstate Prism service set forth in MCI Tariff F.C.C. No.1 to REESE's invoices. MCI then credited REESE with the difference between the tariff rates and the non-distance sensitive rates set forth in Sections 3.1.1 and 3.1.2 of Attachment A of the MCI Agreement. The result is that the services are billed at the non-distance sensitive rates set forth in Sections 3.1.1 and 3.1.2 of Attachment A of the MCI Agreement. The credits for the difference between the rates in the MCI Agreement and the Tariff F.C.C. No.1 rates appear as the "P1 Discount" or the "Total SCA Adjustments" on the MCI invoices .[FN33]

> FN33. Defendant's Exhibit 3: Plaintiff's

> Answers to Interrogatories, No. 2D, p. 5 (Docket No. 14). We note here that tariffs are filed by the carriers and reflect rates approved by the regulatory agencies as being "just and reasonable." *See* Pearce Decl. ¶ 6.

Thus, plaintiff's conclusion is that MCI billed for its long distance services at the non-distance sensitive rates as set forth in the Specialized Customer Agreement entered into by Reese and MCI. Indeed, Section 3.1.1 of Attachment A to the Specialized Customer Agreement states that plaintiff is to pay "Postalized Rates" for Interstate MCI Prism Service and section 2.2 indicates that " 'Postalized Rates' shall refer to per minute rates for Services that are nondistance-sensitive." [FN34] Thus, it appears that plaintiff contracted for and was actually charged a nondistance-sensitive rate by MCI.[FN35]

> FN34. Plaintiff's Exhibit 7: Specialized Customer Agreement and Attachment A (Docket No. 7).

> FN35. Although it appears that the rates MCI was obligated to charge for Interstate MCI Prism Service under the MCI Tariff F.C.C. No. 1 were distance sensitive, it appears that MCI, by applying a discount, only charged plaintiff the non-distance sensitive "Postalized" rate agreed upon when it entered into the Special Customer Arrangement with plaintiff. *See* Plaintiff's Exhibit 11; Section 3.1031 of MCI Tariff F.C.C. No. I (Docket No. 7); Plaintiff's Exhibit E: MCI Invoices (Docket No. 19). Thus, while MCI's invoices set forth the distance-sensitive rate, after the discount is factored in, plaintiff is actually charged the non-distance sensitive rate. *Id.*

It therefore appears that plaintiff's telephone services do not vary by distance and, thus, they do not constitute "toll telephone service" under § 4252(b)(1). As previously discussed, however, "toll telephone service" is also defined as:

> (2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

26 U.S.C. § 4252(b)(2).

***14** Plaintiff contends that its services do not fall under this category of "toll telephone service" either since it is not permitted to make "unlimited calls" for a "flat amount" or "periodic charge." Instead, plaintiff argues, it is charged according to the duration of each individual call which is multiplied by an agreed upon rate and results in bills that vary from month to month. Moreover, plaintiff asserts that its services do not permit it to select a specific geographical area within which all calls made are subject to a flat charge.

Defendant counters arguing that plaintiff's services do fall with § 4252(b)(2) because it does indeed pay a "periodic charge" as evidenced by the fact that it receives monthly bills and that, contrary to plaintiff's assertion, it maintains the right to make an unlimited number of calls each month.

As found by the Court in *OfficeMax,* under the plain language of the statute, to fall under § 4252(b)(2), "the service must entitle the subscriber to make unlimited calls within a specific geographic area for a periodic charge that is to be determined as a flat amount or upon the basis of total elapsed transmission time." *OfficeMax,* 309 F.Supp.2d at 1006.

Here, it does not appear that the services provided to plaintiff fall under either scenario. First, plaintiff is not entitled to make unlimited calls within a specific geographical area. To the contrary, plaintiff must pay for each individual call and may make

and receive calls to any location served by its carriers. Moreover, plaintiff is not charged a "flat amount" or one based on "total elapsed transmission time," but rather has varying charges each billing period depending on the number of calls, the duration thereof and the per minute rate for each call placed. Thus, it does not appear that plaintiff's long distance services fall within the ambit of § 4252(b)(2).

Finally, all else failing, defendant asks the Court to find plaintiff's telephone services taxable under § 4252(a), which defines "local telephone service" to which the excise tax applies. Section 4252(a) provides:

> (a) Local telephone service.For purposes of this subchapter, the term "local telephone service" means-
>
> (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and
>
> (2) any facility or service provided in connection with a service described in paragraph (1).
>
> The term "local telephone service" does not include any service which is a "toll telephone service" or a "private communication service" as defined in subsections (b) and (d).

26 U.S.C. § 4252(a). Defendant's argument is based on the premise that, because Congress intended to tax all telephone services provided by common carriers, that plaintiff's services must fall under § 4252(a) if the Court finds that they are not taxable under § 4252(b).

***15** Notably, defendant does not specifically argue that plaintiff's telephone services fall with the definition of "local telephone service" but rather asks the Court to find 4252(a) applicable by default. As found by the Court in *OfficeMax*, however, it appears too much to conclude that plaintiff services qualify as "local telephone service" where they fail to meet a single requirement of the statutory definition of the term. *OfficeMax*, 309 F.Supp.2d at 1007. Moreover, to the extent that the Government would have us equate "local" with nationwide service, such an interpretation, in our view, is contrary to the plain or natural reading of the statute. *See Fortis, Inc. v. United States*, 2004 WL 2085528 at *15. As such, it does not appear that plaintiff's long distance services constitute "local telephone service" under § 4252(a).

Having concluded that the telephone services at issue do not fall under the definition of "local telephone service" under § 4252(a) or "toll telephone service" under § 4252(b), it appears that they are not taxable under § 4251 and plaintiff is entitled to a refund.

For these reasons, it is recommended that the motion for summary judgment submitted on behalf of plaintiff (Docket No. 7) be granted, and the motion for summary judgment submitted on behalf of defendant (Docket No. 14) be denied.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

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